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## Bi: Race, Sexual Orientation, Gender, and Disability

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*[W]hat is there about a continuum that is unsatisfying? frightening? Why must life—and we—be seen in either “black” or “white,” with no shades in between?<sup>1</sup>*

*The category which most closely reflects the individual’s recognition in his community should be used for purposes of reporting on persons who are of mixed racial and/or ethnic origins.<sup>2</sup>*

### I. INTRODUCTION

In this Article, I will examine various middle or “bi” categories—multiracial, bisexual, transgendered,<sup>3</sup> and bi-abled.<sup>4</sup> The purpose of this broad-

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<sup>1</sup> Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM 305, 324 (1990).

<sup>2</sup> United States Office of Management and Budget, Statistical Policy Directive No. 15, *Race and Ethnic Standards for Federal Statistics and Administrative Reporting* (May 12, 1977), reprinted in 59 Fed. Reg. 29,831, 29,834 (June 9, 1994) (reprinting Directive No. 15 and discussing proposed revisions to this Directive).

<sup>3</sup> By “transgendered,” I include transvestites, transsexuals, and hermaphrodites, as well as individuals who are considered to be androgynous.

<sup>4</sup> We have no term to describe individuals who are neither disabled nor able-bodied. Thus, I have coined the term “bi-abled.”

ranging inquiry is to improve our understanding of the nature of group-based subordination<sup>5</sup> in society and to help us develop fair and effective ameliorative programs to redress that history of subordination. Typically, we think of group-based subordination as bipolar in nature—whites dominate blacks,<sup>6</sup> heterosexuals dominate gay men and lesbians, men dominate women, and able-bodied people dominate disabled people.<sup>7</sup> When we create remedial programs,<sup>8</sup> we therefore try to remedy this subordination by offering programs for blacks, women, gay men and lesbians, and disabled people.

An examination of the bi categories will reveal the inadequacy of our description of subordination, as well as the simplicity of our ameliorative programs. Our description of subordination is incomplete, I will argue, because the bi categories are frequently ignored or invisible. It is too simplistic, for example, to say that our society disdains blacks, gay men and lesbians, or women. Those statements beg the question of who is considered to be black, a gay man or lesbian, and female. Similarly, they do not tell us how society treats individuals who are ambiguously black, gay or lesbian, or female. How society responds to bi individuals, I will argue, reflects in part how determined

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<sup>5</sup> I am concerned about the problem of subordination rather than the larger problem of differentiation or discrimination, because the term "subordination" reflects a group-based historical understanding of oppression faced by individuals in our society. Differentiation or discrimination is not always subordinating. For a general discussion of the problem of subordination, see Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986).

<sup>6</sup> I use the term "black" rather than African-American because, as I will discuss in Part II, individuals who are considered to be black are not necessarily predominantly African-American. I also use the word "black" in lowercase in order to emphasize its arbitrary, rather than fixed, meaning.

<sup>7</sup> Virtually all of the commentators whom I cite in this Article, as well as the major articles on the topic of subordination, rely on this premise and therefore do not question what we mean by "blacks," "women," "gay men and lesbians," or "disabled people." See, e.g., Derrick Bell, *Forward: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) (race); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (gender). My own work also suffers from this premise. See Colker, *supra* note 5. But see Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131 (1979) (challenging premise that only two sexes exist); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 10 (1994) (describing race as "plastic, inconstant, and to some extent volitional").

<sup>8</sup> In each of these areas, however, we have not necessarily even begun to create ameliorative programs. As I will discuss in Part III.B, we rarely create ameliorative programs on the basis of sexual orientation. Similarly, as I will discuss in Part IV.B, we usually condone discrimination rather than create ameliorative programs in the gender area for individuals who identify as transvestites or transsexuals.

it is to retain a polarized classification scheme. As I will demonstrate, sometimes an individual's presence in a bi category can help alleviate subordinating practices, whereas other times it can actually enhance subordination. Thus, for example, society is extremely intolerant of transsexuals who challenge the polarized gender classification scheme,<sup>9</sup> but is not nearly as intolerant of individuals who are, what I call, bi-abled.<sup>10</sup> And, ironically, the more labels that society generates to describe the middle categories, the more intolerant society seems to be of the middle. Therefore, we have four terms to describe bigendered individuals—transsexual, transvestite, hermaphrodite, and androgyny—and no term to describe bi-abled individuals. In sum, our investigation of the bi categories helps us understand how strongly society desires to maintain artificial polarities and how society uses coercive mechanisms to retain these polarities.

An examination of the bi categories can also provide us insight into how to develop fair and effective ameliorative programs. Using the emerging field of disability rights law as my model, I will argue that we need to be more individualized in our understanding of who is deserving of ameliorative treatment. Because some individuals who are bi suffer enhanced subordination because of their bi status, whereas other individuals are somewhat protected from subordination because of their bi status, we should not assume that all individuals who fall into a particular category have faced the same kind or degree of subordination. Our current system of designing ameliorative programs, I will argue, is too simplistic in its assumptions about the correlation between membership in a category and a history of subordination. The disability rights model, I will argue, does a somewhat better job through its individualized assessments, although this model is not entirely effective because class bias, as well as stereotypes about disabilities, sometimes infects this model. I will therefore suggest that an effective individualized model must have strong procedural safeguards to protect against subjective bias. Moreover, I will suggest that administrative problems may sometimes require us to combine a group- and individually-based model. We need to be mindful of the resources necessary to construct a fair and effective individually-based model; a purely individually-based model is rarely feasible.

The issues raised in this Article are timely. The United States Census Bureau is presently considering whether to add the category of "mixed race" to its survey instrument.<sup>11</sup> Athletic organizations are trying to decide whether to

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<sup>9</sup> See *infra* part IV.A. But see Tina Gaudoin, *Prisoner of Gender: Is Androgyny the New Sexual Ideal?* HARPER'S BAZAAR, June 1993, at 114, 116 (suggesting that androgyny is the new sexual ideal).

<sup>10</sup> See *infra* part V.

<sup>11</sup> See *infra* notes 60–67 and accompanying text.

recognize male-to-female transsexuals as women for sports participation.<sup>12</sup> In proposing affirmative action plans on the basis of sexual orientation, some institutions are wondering whether to provide affirmative action for bisexuals in addition to gay men and lesbians.<sup>13</sup> Finally, courts and society are trying to determine who is sufficiently disabled to fall within the protection of the Americans with Disabilities Act.<sup>14</sup> I will argue that each of these classification dilemmas should challenge us to find more individualized ways to determine who in our society is deserving of ameliorative treatment.

The challenges presented by this classification problem are two-fold. On the one hand, we need to find ways to allow individuals to identify as multiracial, transgendered, bisexual, and bi-abled without fearing that moving off of one polar point on the traditional bipolar scheme will subject them to subordination and necessarily preclude them from taking advantage of ameliorative programs. On the other hand, we need to make sure that programs which are designed primarily to assist individuals to overcome a history of subordination are not being used by individuals who have been largely shielded from that subordination through their presence in a bi category. I will therefore argue that our awareness and recognition of the bi categories force us to be more individualized in understanding both the nature of subordination and the structure of effective and fair ameliorative programs.

The structure of this Article reflects its two-part theme, as well as its analogy to disability rights. Within each area of the law that I examine in this Article—race (Part II), sexual orientation (Part III), gender (Part IV), and disability (Part V)—I will first ask what the bi categories can tell us about the nature of subordinating treatment itself. Then, I will use those insights to consider how we can more effectively design ameliorative programs that are more individualized in their consideration of who is entitled to ameliorative treatment. When I discuss disability issues in Part V, I will inquire into the problems we can expect to encounter through the use of a more individualized model, like the disability model. By considering some of the pragmatic

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<sup>12</sup> See *Richards v. United States Tennis Ass'n*, 400 N.Y.S.2d 267 (N.Y. Sup. Ct. 1977) (granting preliminary injunction to professional tennis player, Dr. Renee Richards, who had undergone sex reassignment surgery to prevent her from having to pass a sex-chromatin test to compete in women's professional tennis). See generally Pamela B. Fastiff, *Gender Verification Testing: Balancing the Rights of Female Athletes with a Scandal-Free Olympic Games*, 19 HASTINGS CONST. L.Q. 937 (1992).

<sup>13</sup> See Jeffrey S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 YALE L. & POL'Y REV. 47, at 93 n.190 (1993).

<sup>14</sup> See, e.g., *Obesity Bias Lawsuit: Woman Sues Movie Theater over Access*, NEWSDAY, Feb. 25, 1994, at 53 (describing situation in which woman was not allowed to use her own chair in the wheelchair section of a movie theater) [hereinafter *Obesity Bias*].

difficulties with the individualized model, I will try to blend the group-based and individualized approaches to suggest how we could more fairly and effectively design ameliorative programs.

## II. RACE

Children born to parents of different races<sup>15</sup> were more than three percent of the births in 1990, up from one percent in 1968.<sup>16</sup> Since 1980, the number of black and white interracial married couples has increased from 651,000 to 1.2 million.<sup>17</sup> This change reflects a seventy-eight percent increase since 1980.<sup>18</sup> The rate of interracial marriage is even higher for other racial groups—thirty-eight percent of American-Japanese females, eighteen percent of American-Japanese males, and seventy percent of American Indians enter into interracial marriages.<sup>19</sup> The racial classification system used by our legal system, however, has not kept up with this demographic trend.<sup>20</sup>

The term “multiracial” is rarely acknowledged as part of the American

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<sup>15</sup> The term “race” is itself a socially constructed term:

According to most population geneticists, what we call “races” arise when members of species become separated over a long enough period of time to develop different distributions of characteristics. When those differences are substantial enough, races are said to have developed. The point to keep in mind, however, is that “the level of differences used as a threshold is entirely arbitrary.” Ultimately, if differentiation increases, interfertility decreases between the various races of a species. Human race differentiation has not proceeded to the point where interfertility has decreased, and, given current interaction between races, a decrease in interfertility between human races is unlikely to develop. Race is therefore principally a social construct that gives meaning to certain characteristics of groups within a species.

James Lindgren, *Seeing Colors*, 81 CAL. L. REV. 1059, 1084–85 (1993) (footnotes omitted); see also Lawrence Wright, *One Drop of Blood*, NEW YORKER, July 25, 1994, at 46, 50 (noting that scientific research indicates that genetic variation among individuals from different, accepted racial groups was only slightly greater than the variation within the groups).

<sup>16</sup> Gabrielle Sándor, *The “Other” Americans*, AM. DEMOGRAPHICS, June 1994, at 36, at 39.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 38.

<sup>19</sup> Wright, *supra* note 15, at 49 (quoting Tom Sawyer, an Ohio representative to the United State House of Representatives).

<sup>20</sup> See, e.g., *Wheeler Tarpeh-Doe v. United States*, 771 F. Supp. 427, 455–56 (D.D.C. 1991) (considering whether mixed-race child should be considered black for determination of lost wages), *rev’d on other grounds*, 28 F.3d 120 (D.C. Cir. 1994).

legal system. As Neil Gotanda stated, "The American legal system today lacks intermediate or mixed-race classifications."<sup>21</sup> Although Gotanda is correct to note that the American legal system has frequently failed to acknowledge mixed-race classifications, he is wrong to state that it lacks mixed-race classifications. In fact, one might understand many of our current legal problems as raising questions concerning our classification system for people of mixed racial heritage.

In this part, I will begin with a brief historical discussion to show that problems concerning mixed racial heritage are not new to our legal system. We have always had a sensitivity to color,<sup>22</sup> which in some cases affected the degree of discrimination faced by individuals identified as black. I will then take this history and apply it to areas of the law in which we purportedly use racial categories for ameliorative purposes—transracial adoption and affirmative action. I will suggest that our ameliorative purposes could be best served by bringing more attention to the spectrum within which individuals experience racial categorization.

### A. Color

We tend to remember *Plessy v. Ferguson*,<sup>23</sup> the segregated-railway-car case, as challenging the notion of "separate but equal" for blacks and whites, but the case actually reflected a more radical challenge to the construction of racial categories.<sup>24</sup> Albion Tourg  e, one of the lawyers who undertook to bring

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<sup>21</sup> Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 25 (1991).

<sup>22</sup> In this part, I am using the words "light-skinned" and "multiracial" interchangeably; however, there are important differences that should be recognized. As I have noted above, nearly all people who we call black are multiracial. Therefore, it is certainly wrong to suggest or presume that all people who are labeled "black" and who are also multiracial are also light-skinned. Light-skinned blacks are a subcategory of multiracial blacks. Many multiracial blacks are not light-skinned. Moreover, skin color obviously exists on a spectrum, so my reference to "light-skinned" is just an attempt to refer to one part of a spectrum of color rather than to designate any point that can be easily defined. Thus, both the phrases "light-skinned" and "multiracial" are inevitably imprecise. I am using both phrases to draw attention to people who do not perfectly fit a clear definition of "black," but recognize that neither phrase perfectly achieves that meaning.

<sup>23</sup> 163 U.S. 537 (1896) (holding as constitutional the Louisiana statute that provided for segregated railway cars, which had been challenged by Plessy, a mixed-race defendant who had been convicted under this statute).

<sup>24</sup> *Plessy* is not the only case to challenge the racial classification system. In *McLaughlin v. Florida*, 379 U.S. 184 (1964), for example, the defendants successfully challenged their convictions under a Florida law that imposed stiffer criminal penalties on

about *Plessy*, “urged his associates to select as a defendant a Negro whose complexion was white or nearly white.”<sup>25</sup> Defendant was “‘of mixed Caucasian and African blood, in the proportion of one-eighth African and seven-eighths Caucasian,’ the African admixture not being perceptible.”<sup>26</sup> The arbitrariness of our system of racial assignment was at the heart of Tourgée’s attack on the Louisiana statute. For example, he argued,

The Court will take notice of the fact that, in all parts of the country, race-intermixture has proceeded to such an extent that there are great numbers of citizens in whom the preponderance of the blood of one race or another, is impossible of ascertainment, except by careful scrutiny of the pedigree. . . .

Bnt [sic] even if it were possible to determine preponderance of blood and so determine racial character in certain cases, what should be said of those cases in which the race admixture is equal. Are they white or colored?<sup>27</sup>

Tourgée’s strategy was controversial because darker members of the African-American community thought that it would only benefit those who were nearly white or wanted to pass as white.<sup>28</sup> His strategy raised a controversy concerning the nature of discrimination itself. By alleviating discrimination for light-skinned blacks who can “pass” as white, are we really ridding society of its most invidious forms of discrimination?

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mixed-race couples that were unmarried and cohabitated than on same-race couples that were unmarried and cohabitated. As part of their challenge, petitioners unsuccessfully questioned the legitimacy of the State’s classification system. Appellants challenged the manner in which their race was identified; the arresting officer had established their race based on physical appearance. *Id.* at 187–88 n.6. Appellants argued “that the statutory definition is circular in that it provides no independent means of determining the race of a defendant’s ancestors and that testimony based on appearance is impermissible because not related to any objective standard.” *Id.* Although the Supreme Court overturned the conviction, it did not consider this due process argument. Throughout the decision, the Court refers to appellants as “Negro” without justifying its categorization. As in *Plessy*, in which petitioners challenged the right of the railway company to make facial judgments concerning race, the petitioners in *McLaughlin* challenged the right of the police officer to make facial judgments concerning race. This argument, however, has never been seriously accepted by our courts. I thank Bill Rubenstein for bringing this case to my attention.

<sup>25</sup> JACK GREENBERG, *CASES AND MATERIALS ON JUDICIAL PROCESS AND SOCIAL CHANGE: CONSTITUTIONAL LITIGATION* 585 (1977).

<sup>26</sup> Brief for Plaintiff in Error at 3, *Plessy* (No. 210), reprinted in 13 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 28, 30 (Philip B. Kurland & Gerhard Casper eds., 1975).

<sup>27</sup> *Id.* at 10.

<sup>28</sup> GREENBERG, *supra* note 25, at 585.

The color issue raised by Tourgée's legal strategy is rarely remembered;<sup>29</sup> his unsuccessful challenge to the system of separate but equal is the dominant lasting legacy from his effort.<sup>30</sup> One of the few extensive discussions of Tourgée's legal strategy is written by Professor Cheryl Harris.<sup>31</sup> In *Whiteness as Property*, Harris tells a compelling story about her light-skinned black grandmother who passed as a white in order to work in a department store.<sup>32</sup> Her story demonstrates the relative privilege that can be accorded to some light-skinned blacks.<sup>33</sup> Harris's grandmother was able to obtain employment while her grandfather, whom I presume was darker-skinned, "was trapped on the fringes of economic marginality."<sup>34</sup> The story of her grandmother "passing" is a story about the range of experiences that blacks may endure, depending on their skin color. It reflects our society's consciousness of color along a spectrum, rather than its consciousness of race at only two bipolar points.<sup>35</sup> In a society of limited resources, in which we can only accord affirmative action benefits to a few people, I argue that we may have to grapple with the question of whether Harris's grandmother is as deserving of affirmative action as Harris's grandfather.

A story from my own legal practice may better illuminate this point. When I was working in the Civil Rights Division at the United States Department of

<sup>29</sup> But see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1745-50 (1993) (discussing the *Plessy* legal strategy).

<sup>30</sup> See, e.g., Gotanda, *supra* note 21, at 38 (describing *Plessy* as "[t]he well-known 'separate but equal' case").

<sup>31</sup> Harris, *supra* note 29, at 1745-50; see also CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* (1987).

<sup>32</sup> Harris, *supra* note 29, at 1710-13.

<sup>33</sup> Surprisingly, however, Harris does not use the story to further Tourgée's thesis about the arbitrariness of racial classification. Instead, she simply sees her grandmother as a black who "passed" without questioning why we call her black at all.

<sup>34</sup> Harris, *supra* note 29, at 1710.

<sup>35</sup> I also wonder if the grandmother truly "passed" in the way that Harris describes. Did none of her co-workers suspect her black racial background? Had they been taught that it was acceptable to ignore such background when a person was light-skinned? In the gay rights context, it has often been my experience that people who think they are passing as heterosexual are really not passing. Many people may know of their homosexuality, but have been taught to tolerate it so long as they do not flaunt it. The grandmother certainly tried to hide her black heritage, but we cannot fully tell from Harris's account whether she truly passed. Finally, I want to emphasize that by discussing the spectrum along which race may be experienced, I am not trying to discount the fact that Harris's grandmother suffered disadvantage because of her race. My point is simply that her skin color allowed her to mitigate some of those disadvantages while still facing others. Harris's grandmother, for example, probably attended racially segregated, black schools and lived in racially segregated, black neighborhoods.



Justice, I worked with a team of attorneys on a race and gender employment discrimination case against a bank. The lawyers on the case soon observed that dark-skinned blacks were hired to perform jobs away from public view, such as sorting and counting money in the vault, whereas light-skinned blacks<sup>36</sup> were sometimes hired as tellers. The light-skinned blacks were not usually passing; they were benefitting modestly, as compared with darker-skinned blacks, from a color conscious society.<sup>37</sup> Nonetheless, light-skinned blacks were less likely to be hired as tellers than similarly qualified whites, and if they were hired as tellers, they were less likely to be promoted to a managerial position. To label all the blacks as black would not have truly dismantled the racial classification system in that workplace. Only by acknowledging the cultural significance attached to the points along the spectrum of race could one begin to fully address discrimination at that workplace.<sup>38</sup> A *failure* to recognize the significance of color in fashioning a remedy causes the problem noted by Tourgée's critics—only light-skinned blacks might benefit from a remedial order. A simple order not to discriminate on the basis of race could foreseeably benefit light-skinned blacks, by giving them better opportunities to be hired as tellers and promoted, while doing little for dark-skinned blacks.<sup>39</sup>

Ironically, Tourgée's legal strategy, which was attentive to those color

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<sup>36</sup> Although I call these individuals "light-skinned blacks" during this discussion, they could more accurately be considered to be a subcategory of multiracial individuals. I say "subcategory" because not all multiracial individuals are light-skinned. A better way to understand my reference to their skin color is to understand it as a reference to how assimilated they are. My discussion of light-skinned blacks could also apply to other characteristics that blacks may have which may make them more acceptable to whites. For example, a colleague of mine told me that his wife was told at a job interview with a bank that it would consider hiring her if she would "relax" her hair. Similarly, black men are often requested to shave their beards in order to be hired or retained at a job. In both cases, blacks are being asked to conform their physical appearance to a white standard. Light skin color is therefore not the only trait that might make some blacks more acceptable to white society through assimilation to white appearance.

<sup>37</sup> To the best of my knowledge, this case was never litigated on the merits. Thus, my description of the facts reflects my personal belief and not that of the Department of Justice. The facts were also never held as findings of fact by any court of law. I have therefore told the story in a way that hopefully keeps the identity of the bank anonymous.

<sup>38</sup> The Justice Department settled the case after I had stopped working there; I do not believe that the settlement was explicitly attentive to color.

<sup>39</sup> On the political level, this problem is seen repeatedly in New Orleans, a very color-conscious city. The three African-Americans to serve as mayor (Dutch Morial, Marc Morial, and Sidney Barthelemy) have all been very light-skinned, whereas unsuccessful African-American candidates (such as Bill Jefferson) have often been darker-skinned. Because New Orleans is a black majority city, it takes color consciousness by both the black and white communities to achieve these color-conscious results.

distinctions, was considered conservative at the time and is often described as conservative today. By looking at contemporary areas of the law that continue to raise problems of racial classification, I will argue that Tourgée was post-modern before his time in challenging racial classification systems for their arbitrariness. If Tourgée had been truly vindicated in *Brown v. Board of Education*,<sup>40</sup> we would be much further along in dismantling the arbitrariness of our racial classification system.

### B. *Ameliorative Treatment*

In the preceding section, we saw that the property value in whiteness has been recognized by some civil rights activists since the nineteenth century. Nonetheless, our description of how racism operates in the United States rarely mentions color or racial heritage as a factor in the nature of subordination. Because our description of racism has largely ignored that factor, the ameliorative programs that we have designed to overcome racism have, not surprisingly, also ignored color or racial heritage as a factor in determining who is most worthy of ameliorative treatment. In this section, I will look at two kinds of programs—affirmative action and racial preference policies in the adoption context—to exemplify the clumsiness with which we have designed ameliorative programs on the basis of race.

This discussion is limited to the use of race for *ameliorative* purposes—situations in which we are consciously trying to *overcome* a history of subordination on the basis of race. Through this discussion, I do not mean to suggest that, because of their multiracial heritage, people should not be able to claim discrimination on the basis of race. As I will discuss, nearly all individuals whom we categorize as black have a multiracial heritage. Moreover, when someone has actually experienced racial discrimination, it does little good to speculate how that treatment might have been different if that person were lighter-skinned or had “relaxed” hair. The discriminatory treatment speaks for itself and must be redressed. The relief in that case is not what I call ameliorative; it is direct relief for an identified victim of discrimination under standard “make whole” principles that are beyond the scope of this Article.

In the ameliorative category, however, I am not talking about direct relief for identified victims of discrimination. Instead, I am talking about societal programs that are developed to respond to group-based subordination in society. The two programs that I identify are affirmative action and adoptions. Before discussing these programs, however, I would like to identify the difficulty with simplistically describing these programs as ameliorative.

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<sup>40</sup> 347 U.S. 483 (1954).

Affirmative action programs often have several, possibly simultaneous, purposes.<sup>41</sup> Although they may be ameliorative, they may also serve the purposes of increasing the diversity of ideas or providing role models. Moreover, many individuals believe that despite the ameliorative purposes of affirmative action, an unintended stigma may also result from the use of race-conscious measures.<sup>42</sup> Because the ameliorative results of race-based affirmative action become more ambiguous in the multiracial context, focusing on these individuals adds a new level of difficulty to the problem. I will argue that recognition of the applicability of affirmative action to multiracial individuals forces us to be more individualized in devising fair and effective affirmative action programs.

Racial preference policies in the context of adoption have a highly contested ameliorative purpose. The National Association of Black Social Workers, for example, believes that racial classification serves an ameliorative purpose,<sup>43</sup> whereas other leaders in the black community, such as Professor Randall Kennedy, believe that racial placement policies harm the well-being of black children and perpetuate racial stereotypes.<sup>44</sup> A focus on the adoption of multiracial children, who have been historically categorized as black, adds a further dimension to this tension because, as I will argue, the ameliorative purposes of race-conscious placement become harder to identify. Because the ameliorative purposes served by a racial preference policy are less clear in the transracial adoption context than in the affirmative action context, I will be more critical of our use of race-conscious policies in the adoption context.

### 1. *Affirmative Action*

The classification system that we use for affirmative action purposes has been driven by a categorization scheme developed on the federal level. Because this scheme has never recognized multiracial individuals, these individuals have been largely invisible as we have created affirmative action programs. As I will

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<sup>41</sup> See *infra* part II.B.1.

<sup>42</sup> See, e.g., STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 50, 86 (1991).

<sup>43</sup> Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 926 (1994) (quoting NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, POSITION PAPER (Summer 1973)).

<sup>44</sup> Michael Rezendes, *Debate Intensifies on Adoptions Across Racial Lines*, BOSTON GLOBE, Mar. 13, 1994, at 1, 26 (reporting that "Kennedy, for his part, said that race should never be considered in adoptions, even if there comes a day when enough black families can be found to adopt all the black children waiting for families to call their own"); see also Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1818 n.305 (1989) (describing a race-conscious placement as "scandalous").

argue below, this artificially polarized classification scheme has helped us ignore the range of subordination that individuals may experience based on race.

In 1977, the federal government issued Statistical Policy Directive No. 15 to standardize the definition of race used by the public and private sectors.<sup>45</sup> This Directive is still in use and does not include the categories "other" or "mixed-race." Instead, it categorizes mixed-race individuals into one racial category: "The category which most closely reflects the individual's recognition in his community should be used for purposes of reporting on persons who are of mixed racial and/or ethnic origins."<sup>46</sup>

The Directive's handling of mixed-race individuals is troublesome in two respects. First, it perpetuates the *community's* right to define race, rather than allow individuals to define their own race. Second, it renders the category of "multiracial" invisible.

The problems with this Directive can be seen in an early affirmative action controversy from New York City.<sup>47</sup> After New York City instituted an affirmative action program for promotion from police officer to sergeant, six officers came forward and asked to be reclassified from white to black or Hispanic.<sup>48</sup> One officer indicated that he had originally checked both "black" and "white" on the application form, but that the department computer had arbitrarily classified him as white. A similar problem occurred in Boston when two firefighters, the Malones, claimed they were black because their maternal great-grandmother was black.<sup>49</sup> The assertion about being black was brought into question because they did not make that assertion until after they had taken the first exam for the position. Moreover, there was some question as to whether they held themselves out in the community as black. At a hearing, however, two co-workers testified that they knew the firefighters had been hired as blacks, so the perception within the firefighter community was that

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<sup>45</sup> See 59 Fed. Reg. 29,831, 29,834 (June 9, 1994) (reprinting Directive No. 15).

<sup>46</sup> *Id.*

<sup>47</sup> The classification problem also frequently occurs with the label "Hispanic." See Alex M. Saragoza et al., *History and Public Policy: Title VII and the Use of the Hispanic Classification*, 5 LA RAZA L.J. 1, 1-2 (1992) (discussing question of whether Spaniards should be included in the "Hispanic" category for the purpose of affirmative action); see also Haney López, *supra* note 7, at 10 (describing how he and his brother, both of whom had a fourth-generation Irish father and Salvadoran immigrant mother, chose different racial identities).

<sup>48</sup> Elizabeth Kolbert, *White Officers Seek Minority Status*, N.Y. TIMES, Dec. 6, 1985, at B16.

<sup>49</sup> Steven Marantz & Peggy Hernandez, *Defining Race a Sensitive, Elusive Task*, BOSTON GLOBE, Oct. 23, 1988, at 33, 40.

they were black.<sup>50</sup>

The New York and Boston cases show the awkwardness of racial classification systems, even for benign purposes. In both cases the question was whether the public safety employees could be considered black. There was no discussion of the need for a "mixed-race" category and whether the "mixed-race" category should be treated differently than the "black" category.

In another context, Randall Kennedy has challenged what he calls the "racial distinctiveness" thesis—an argument that race or minority status imbues an individual with a distinctive contribution to a field or life experience.<sup>51</sup> The shortcomings of the racial distinctiveness thesis can be seen especially in the New York and Boston cases. Nowhere in the classification problem that was considered did anyone ask whether these individuals had a special reason to be deserving of affirmative action protection. Had they experienced educational or economic deprivation because of their racial status? Did they have a special interest in assisting with public safety problems in minority communities? Kennedy encourages us to ask these kinds of questions closely within specific contexts and not to assume that all people of color are alike. Boston and New York felt more comfortable developing and enforcing clumsy categories of "black" and "white," with all blacks benefitting from affirmative action and no whites benefitting, than asking these more probing questions. As a result of such policies, the Malones of this society will have an incentive in the future, when seeking the benefits of affirmative action, to check the box "black" at the earliest possible stages of the application process and not to acknowledge their mixed-race background.<sup>52</sup> Such actions will perpetuate the "one drop of blood" rule, under which a person with a known trace of African ancestry is considered to be black.<sup>53</sup>

Despite these problems with Directive No. 15, which would not allow any of these individuals to be classified as mixed-race, the federal government received strong criticism when it tried to change the policy in 1988. The proposed 1988 changes would have added the racial category "other" and required classification by self-identification.<sup>54</sup> Opponents included federal

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<sup>50</sup> *Id.* at 40.

<sup>51</sup> Kennedy, *supra* note 44, at 1778.

<sup>52</sup> See Wright, *supra* note 15, at 47 (quoting the mother of multiracial children who said that multiracial individuals know "to check the right box to get the goodies"). Even for individuals who are recognized as minorities, the specific minority classifications they are put in can make a big difference in terms of social or economic entitlements. For example, some native Hawaiians have sought to be labeled "Native Americans," rather than "Asian" or "Pacific Islanders," which would entitle them to enjoy privileges concerning gambling concessions that they would not otherwise enjoy. *Id.*

<sup>53</sup> Gotanda, *supra* note 21, at 24.

<sup>54</sup> 59 Fed. Reg. 29,831, 29,832 (June 9, 1994).

agencies, larger corporations, and members of minority groups:

Respondents who opposed the change asserted that the present system provided adequate data, that any changes would disrupt historical continuity, and that the proposed change would be expensive and potentially divisive. Some members of minority communities interpreted the proposal as an attempt to provoke internal dissension within their communities and to reduce the official counts of minority populations.<sup>55</sup>

Acquiescing to such arguments, the federal government decided not to make any changes at that time.<sup>56</sup> Nonetheless, in 1993, the federal government again began to explore making changes in the racial classification system.<sup>57</sup> In June 1994, it invited comments on changes such as "adding an 'other' category," "adding a 'multi-racial' category," and "providing an open-ended question to solicit information on race and ethnicity."<sup>58</sup>

It is not clear whether the federal government will be successful in adding the "multi-racial" category, but the Census Bureau appears to be slowly moving in that direction. In the 1990 Census, a new box was added to the survey instrument marked "other."<sup>59</sup> Although ten million people (about five percent of the United States population) marked "other," the Census Bureau did not actually take account of their status.<sup>60</sup> It divided them up proportionally among the other categories. Mixed-race individuals who filled out the forms may therefore have felt that they were being recognized but, in fact, they were invisible on the official record books. In 1996, however, the Census Bureau plans to include a "multiracial" category on its survey instrument. This change has caused much controversy in the civil rights community. The Association for Multiethnic Americans, an umbrella group for approximately sixty multiracial groups, supports the change.<sup>61</sup> Billy Tidwell, of the National Urban League, however, opposes the change because "splintering the black community between light-skinned and dark, would 'turn the clock back on the well-being' of African Americans."<sup>62</sup> Tidwell's arguments sound remarkably like the arguments made against Tourg  e's strategy, which challenged the racial classification system in the nineteenth century. The National Urban League

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 29,832-33.

<sup>59</sup> Hanna Rosin, *Boxed in: America's Newest Racial Minority*, NEW REPUBLIC, Jan. 3, 1994, at 12.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (quoting Bill Tidwell).

wants to insist on its right to claim large numbers of individuals as black who might self-identify as multiracial. Multiracial groups therefore criticize groups like the National Urban League for their tendency "to cling to racial differences and a zero-sum mentality . . . ."<sup>63</sup> They argue that Tidwell's position is disrespectful to mixed-race people who suffer emotionally when they cannot see their reflection in a box to check.<sup>64</sup> It is ironic that the same groups who have criticized white society for defining them stereotypically are not more tolerant of the desire of multiracial groups to be able to define themselves more accurately.

Although the federal government has been slow to recognize the "mixed-race" category, some private institutions have begun to try to change this practice of insisting that people classify themselves into rigid categories. Columbia Law School, for example, asks student applicants for admission who wish to have their ethnic background taken into account to submit ethnic statements. In addition, the application invites students to check off more than one racial or ethnic category if appropriate.<sup>65</sup> James Lindgren comments that the racial classification question makes people feel uncomfortable because it seems to ask people to indicate how closely they fit racial stereotypes.<sup>66</sup> Similarly, Judy Scales-Trent reports that people feel uncomfortable when she tries to explain to them that she is a "white black woman," because categories "make the world appear understandable and safe."<sup>67</sup> On the other hand, transgressing boundaries to acknowledge the category of "mixed-race" or "multiracial" is a step toward creating a more individualized sense of the meaning of race to each person. Such ethnic statements might make us feel

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> The Columbia Law School application contains the following categories: American Indian or Alaskan, black or African-American, white or Caucasian, chicano or Mexican-American, Asian or Pacific Islander, Puerto Rican, other Hispanic, East Indian, other, and unknown. The accompanying instructions state,

If you wish to have our Admissions Committee consider your racial or ethnic background in its evaluation of your candidacy for admission, please indicate your status by checking one or more of the following categories.

Also, please attach a separate statement describing your ethnic, cultural and linguistic heritage, and how this identification may have found expression in your academic, extracurricular or community undertakings.

COLUMBIA LAW SCHOOL, APPLICATION FOR ADMISSION (1994).

<sup>66</sup> Lindgren, *supra* note 15, at 1084.

<sup>67</sup> Scales-Trent, *supra* note 1, at 305.

uncomfortable, but they may be a more respectful way to acknowledge the socially constructed and individualized experience of race in our society.

Scott Minerbrook, for example, who had a white biological mother, a black biological father, and a white grandmother who refused to have any relationship with him, believed that he "felt the injustice of race hate more keenly than my black friends, because for them, racism didn't reside inside the family."<sup>68</sup> Minerbrook's classification as multiracial becomes much more significant when we have an opportunity to hear how race has mattered in his family history and experience. Similarly, Scales-Trent's experience as a black person was clearly affected by her light skin color.

The Columbia Law School policy, however, of seeking personal narratives is not without its problems. First, it seems to presume that the only purpose of affirmative action is to assist individuals in overcoming historical disadvantage. Affirmative action for African-Americans in law school admissions, however, serves other purposes, such as diversifying a student body, educating African-Americans who can serve as role models for the next generation, and increasing the quantity and quality of legal services available to the black community. There is no reason to place the burden of explaining those benefits on the individual candidate; Columbia Law School is as capable of describing those benefits as the candidate.<sup>69</sup>

Second, the Columbia model seems to presume only racial minorities have a significant ethnic or racial story to reveal. Too often, we think of whites as not having a race (hence, the label "white," which stands for an absence of color). To move fully toward a multiracial jurisprudence, however, I would argue that we need whites as well as others to contemplate the significance of race in their lives. For many whites, it may be a story of race privilege, but it is still a story about how race has mattered in their lives. The Columbia model seems to suggest that not all candidates will comment on their race or ethnicity; if everyone were expected to comment, then there would be no need to offer an optional question. And certainly, if the point of the question is to allow candidates to ask for special treatment to allow them to overcome obstacles that they have faced in life, then one might well imagine that many whites would not be able to offer any evidence of special obstacles due to their race. On the other hand, I believe it would be good for us to have institutions or individuals encourage us to consider how our race has mattered in our personal history and

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<sup>68</sup> Scott Minerbrook, *The Pain of a Divided Family*, U.S. NEWS & WORLD REP., Dec. 24, 1990, at 44.

<sup>69</sup> As Justice Blackmun suggests in his dissent in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 561 (1989) (Blackmun, J., dissenting), no individual black person should have to convince a court that Richmond, Virginia, the "cradle of the Old Confederacy," had a history of discrimination against African-Americans because "[h]istory is irrefutable."



to understand our race as part of a spectrum rather than part of bipolar categories.

If we collected more histories of how race has mattered in people's lives, we might be able to determine if darker-skinned blacks are the victims of more discrimination in our society than lighter-skinned blacks.<sup>70</sup> If so, we might want to create legal or political structures to break down that color consciousness.<sup>71</sup> The Columbia Law School model might enable us to more specifically determine who is deserving of affirmative treatment because of prior social or economic disadvantage, although these disadvantages should not be the only factors in determining who is worthy of affirmative treatment. An example may illuminate my argument. Two black individuals may be applying for admission to Columbia Law School. Candidate number one comes from a middle-class background. Her parents were university professors, and she went to schools in middle-class neighborhoods as well as to a private Ivy League college. Candidate number two comes from a working-class background. His parents had only a high school education and worked in menial jobs like janitorial work and housecleaning. He went to a historically segregated black college in the South. Assuming that both applicants have equivalent grades and test scores, I would suggest that candidate number two is more deserving of affirmative action in admissions. Both of them will help diversify the classroom and serve as role models for blacks in our society, but candidate number two has experienced a more racially constructed and thereby disadvantaged educational background than candidate number one. Ideally, we would have space in our law schools for both candidates, but realistically, we often have to make difficult choices. I am simply suggesting that a history of disadvantage may be relevant to making these tough choices.

Our existing race-based affirmative action programs often clumsily use race

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<sup>70</sup> Not everyone agrees on what the implications would be in recognizing the difference in our treatment of light- and dark-skinned blacks. For example, Lawrence Wright reports,

Itabari Njeri, who writes about interethnic relations for the *Los Angeles Times*, . . . maintains that the social and economic gap between light-skinned blacks and dark-skinned blacks is as great as the gap between all blacks and all whites in America. If people of more obviously mixed backgrounds were to migrate to a Multiracial box, she says, they would be politically abandoning their former allies and the people who needed their help the most.

Wright, *supra* note 15, at 54.

<sup>71</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993), has contained a prohibition against "color" discrimination since its inception; however, virtually no cases have been brought under that theory.

as a proxy for disadvantage without forcing us to inquire into actual histories of disadvantage. It is time that we try to refine those programs when individualized determinations are possible. One example of a clumsy application of affirmative action can show how individualized treatment may reduce stigma while also more appropriately benefitting those individuals who have faced race-based disadvantages in society. Naomi Zack, the author of the powerful book, *Race and Mixed Race*,<sup>72</sup> shares with the reader her own story of benefitting from affirmative action. Zack recounts that her mother, with whom she grew up, was a white Jewish immigrant. Her father, who was not identified to her as her father until she was sixteen, was a black man. Race did not become a preeminent preoccupation in her life until she returned to academia in 1990, at the age of forty-six. After doing some adjunct teaching, she obtained a tenure-track position in the Department of Philosophy, at the University of Albany of the State University of New York, through a university (minority) affirmative action recruitment program called Target of Opportunity (TOP).<sup>73</sup> She rationalizes acceptance of this position by noting that only seventy-five academic philosophers in the United States out of ten thousand are "of African descent."<sup>74</sup> I have no doubt that Zack was worthy of being hired by the University of Albany because her book is an impressive philosophical and historical project, as well as very creative.<sup>75</sup> Zack's case, however, seems to reflect a reflexive use of affirmative action rather than individualized consideration of merit.

Zack's personal history, to the extent that she recounts it for the reader,<sup>76</sup> does not seem to reflect much race-based disadvantage. On the other hand, Zack's work on race issues is profoundly original and deserves our serious attention. The fact that Zack herself is mixed-race clearly influenced her choice of topics and analysis. But we do not have to presume that Zack, as a mixed-race individual, would make an outstanding contribution to scholarship; we have concrete evidence of that contribution in front of us.

I would therefore argue that Zack was deserving of an appointment at Albany in a race-related field of study because her scholarship is outstanding. I would be reluctant, by contrast, to state (based on the available information,

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<sup>72</sup> NAOMI ZACK, *RACE AND MIXED RACE* (1993).

<sup>73</sup> *Id.* at xii.

<sup>74</sup> *Id.* at xiii.

<sup>75</sup> Admittedly, her book was not published until three years after her appointment, but Zack indicates that she submitted an early draft of portions of the book to the University of Albany as part of the application process. *Id.* at xii. Given the time lag between writing and publishing, it seems plausible that Zack had substantially begun the project at the time of her appointment.

<sup>76</sup> *Id.*

which may be incomplete) that Zack is an individual who has faced personal disadvantages that make her worthy of affirmative treatment. Because we often use affirmative action both to increase the diversity of scholarly areas of study and to assist individuals with disadvantaged backgrounds, we avoid the more difficult and important step of redefining merit to acknowledge the excellence of the scholarship of someone like Zack. There is no reason to taint Zack's appointment with the stigma of affirmative action<sup>77</sup> and to deprive a more truly disadvantaged individual from benefitting from affirmative action. Stephen Carter has said,

Because the principal battleground is affirmative action, which benefits mainly those least in need of society's aid, there may be a tendency for all of us to forget who it is that is suffering as the rest of us toss our brickbats: for it is our people, black people, those on whose behalf all of us claim to be laboring, who are withering in the violent prisons that many of our inner cities have become.<sup>78</sup>

Carter argues that we should primarily use affirmative action programs for individuals in our society who need our special attention.<sup>79</sup> If we target affirmative action in that way, while also redefining merit,<sup>80</sup> then more

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<sup>77</sup> I realize that the merit-based approach that I am suggesting for Zack's appointment does not necessarily make any inroads on the stigma problem, because students in a classroom may presume that affirmative action rather than merit caused a particular appointment. It is therefore not enough for us to redefine merit to make it clear that we value the contributions of a particular African-American. In a university setting, professors or administrators who engaged in that redefinition of merit need to publicly voice their views regarding the merits of the person who has been hired to overcome the presumption of incompetence that often accompanies affirmative action appointments. The redefinition of merit must occur in a public setting, not just in the closed room of a faculty appointment meeting.

<sup>78</sup> CARTER, *supra* note 42, at 252.

<sup>79</sup> Although I agree with Carter that we should do a better job of redefining merit to lessen the need for affirmative action, I also think we need to be careful not to limit the purpose of affirmative action to helping individuals overcome societal disadvantage. See CARTER, *supra* note 42, at 27. As I discuss below, other rationales for affirmative action do exist that deserve our serious attention.

<sup>80</sup> Clumsy uses of affirmative action, in my view, can often avoid the more probing discussions of the definition of merit. One of the best examples of this phenomena is *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), in which the Santa Clara Transportation Agency successfully defended an affirmative action program in which it promoted a woman, Joyce, over a man, Johnson. Joyce had been one of the first women hired in a road maintenance position and appears to have led the way for other women by, for example, persuading the employer to issue coveralls to her (as it had to the men) so that

individuals may truly experience expanded opportunities.<sup>81</sup>

Instances like Zack benefitting from affirmative action raise the broader question of what is the purpose of an affirmative action program. I would like to discuss three rationales. First, a purpose of affirmative action might be to benefit people who have suffered economic or social disadvantage because of their race. Under that rationale, Zack might not have been an appropriate candidate. Second, a purpose might be to hire people with diverse life experiences that might be reflected in their scholarship. Zack would qualify under that rationale. Third, a purpose might be to provide role models for students who are also members of minority groups. Zack might also qualify under that rationale as a role model both for mixed-race students and black students (if dominant society views her as black).<sup>82</sup>

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she would not keep soiling her own clothes. Rather than get credit for this activism, she was labeled as a troublemaker. One panel member described her as a "rebel-rousing, skirt-wearing person." *Id.* at 624 n.5. Johnson challenged the selection of Joyce over him because he scored a 75 as compared to her 73 on an interview. *Id.* at 623-24. The institution used affirmative action to justify her promotion rather than redefining merit. As my colleague, Jules Lobel, has suggested to me, affirmative action as a justification can be a mechanism that allows white men to avoid confronting their lesser competency as compared to a woman or a black person. Similarly, Joyce was entitled to be told that she was selected in part because her advocacy on behalf of women was valued.

<sup>81</sup> An example that illuminates this thesis emerges from a conversation I had with my colleague, Jody Armour. Jody described an educational program in which he has participated that tries to help disadvantaged blacks get a "better chance" by enabling them to attend high-achievement high schools. Originally, the program primarily benefitted blacks from inner-city, segregated schools. Recently, he has seen an increasing number of black children that apply to the program who come from middle-class backgrounds. It is tempting for the organizers of this program to pick such children because, given their lesser disadvantage, they are less at risk of failure in the "better chance" program. I am suggesting that when we devise a program for the explicit purpose of assisting disadvantaged individuals in our society, we should stay mindful of that original purpose in selecting beneficiaries. Nonetheless, I am not suggesting that assisting disadvantaged individuals is the only possible rationale for affirmative action programs.

<sup>82</sup> A fourth rationale that has been suggested to me is that the dynamic on a faculty might change if sufficient numbers of women and blacks are hired. If one-half of the members of a faculty were black, it has been suggested that the dynamic at a faculty meeting would be transformed. This rationale, in my opinion, is related to the second rationale that I have identified because it presumes a diversity of experience brought to the room by the black professors. This rationale, however, also suffers from some of the presumptions of the racial distinctiveness thesis in that it presumes that all blacks inherently bring a different perspective or dynamic to a faculty. Clarence Thomas's presence on the United States Supreme Court is an obvious example of the presence of a black individual in a group not necessarily creating the existence of a new and distinctive voice based on race. I

Although I have been a part of various faculties since 1985 that have consciously used affirmative action to increase the number of African-Americans on the faculty, I have never heard anyone ask about the purpose of the program in order to evaluate whether someone like Zack is a better candidate than someone else of African descent.<sup>83</sup> I believe that it does make sense to use affirmative action for the first and third purposes that I have identified above, because those purposes help us overcome a group-based experience of racial subordination in society. The second purpose, however, need not be achieved through the use of affirmative action because it can readily be achieved through redefinition of the term "merit." I agree with Randall Kennedy, who has observed that it is racist to assume that members of racial minority groups have an inherently distinctive way of thinking about race.<sup>84</sup> If we want to hire someone to teach and write about race issues, then we should redefine merit by identifying an opening in the field of race relations, African-American history, or whatever.<sup>85</sup> Then, when someone like Naomi Zack applies, we might hire her because of her proven expertise in that field, not simply because she is of African heritage. Zack would be hired because of her expertise and might not face the stigma of affirmative action.

I realize that this argument will be considered controversial by many people because it refuses to lump all blacks together as equally deserving of affirmative action and because it reduces the number of individuals labeled "black." If an institution only accepts rationale number one for affirmative action, then it limits affirmative action to those individuals who can

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am not comfortable with making the global assumption that the presence of additional blacks (or women) on a faculty inherently creates a distinctive voice, although it may be true in many individual cases. I have therefore not identified this rationale as a separate rationale.

<sup>83</sup> My presentation at a faculty symposium, however, has now provoked such a discussion.

<sup>84</sup> See Kennedy, *supra* note 44, at 1784, 1816; see also CARTER, *supra* note 42, at 27 (arguing that blacks should insist on an affirmative action "that rewrites the standards for excellence, rather than one that trains us to meet them").

<sup>85</sup> A story I often tell about myself is that when I was interviewing for a law teaching job, a dean looked at my resume during our interview and said, "I see you do feminist theory. Do you do anything else?" He had apparently erased everything from my resume except my work in feminist theory and had apparently not valued the feminist theory highly. When I was later considered for a position at that law school, I was told that some members of the faculty had openly discussed that it was a plus that I was a woman. I would have preferred the faculty to have had a discussion as to why they needed a specialist in feminist theory on their faculty and why I was the most appropriate person to fill that need. It was easier to talk about me as a generic woman than to discuss the specific assets I could bring to the faculty in part because, as a woman, I had developed an expertise in feminist theory.

demonstrate how their life experiences have been negatively influenced by their race. Ultimately, however, I believe that my argument is more respectful than the status quo because it recognizes the diversity of life experiences that exists within the so-called black community. In fact, I think it would undermine the validity of affirmative action if the children of New Orleans Mayor Marc Morial (a very light-skinned black who is also upper-class and the son of a previous mayor) received the same affirmative treatment as a dark-skinned black who has grown up in the New Orleans housing projects on welfare. Moreover, my argument should help darker-skinned blacks by not allowing authorities to achieve a racially balanced workforce by only hiring lighter-skinned blacks or multiracial individuals. Under our present classification system, Naomi Zack is as black as a recent black immigrant from South Africa. It is time that we recognize the cultural differences that may exist between these two groups<sup>86</sup> in fashioning an effective affirmative action program for the neediest people in our society.

Nonetheless, I do not want to go too far with my argument. As I said earlier, I do believe that the role model theory (rationale number three) is a valid rationale for affirmative action in certain settings. For example, I believe that it does make sense in the educational context to say that all of our students benefit from seeing blacks and women serve as competent teachers and role models.<sup>87</sup> And, in fact, it may be particularly important to hire such role models in areas of the curriculum in which women and blacks have been historically underrepresented, such as commercial law.<sup>88</sup> Redefining merit, therefore, to recognize fields such as African-American studies or women's studies will not do enough to integrate women and blacks into a faculty if they are concentrated only in a small number of fields.

The role model theory could also benefit from a redefinition of merit. It is typical, for example, in the educational context for women and racial minorities

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<sup>86</sup> Of course, in some situations, a light-skinned black may prove to be more deserving of affirmative action than a darker-skinned black immigrant from Africa. I am not suggesting a perfect correlation between skin color and privilege; I am simply suggesting that we recognize the complexities of the black experience when determining who may be most worthy of affirmative treatment.

<sup>87</sup> The United States Supreme Court rejected the role model theory in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 275 (1986) (finding that role model theory has no "logical stopping point").

<sup>88</sup> Similarly, we probably need to value the work that men do in feminist theory and whites do in civil rights, because men doing feminist theory work and whites doing civil rights work may help our students move beyond their stereotypes about who can do that kind of work. Thus, Jack Greenberg should be valued for his civil rights work in part because he helps send a message to whites that it is not only blacks who need to be concerned about civil rights.

to serve an enhanced advising function on a faculty because of their underrepresentation in comparison with the student body. At tenure time, however, the qualifications for tenure usually focus primarily on scholarship with some attention to classroom teaching. Hours spent inside or outside of the office advising students or attending functions are usually not included in the definition of merit for tenure. If we are going to embrace the role model theory in our affirmative action programs, then we have a responsibility to the individuals that we hire to value the work they do in the community as good role models.

Finally, even if we embrace the first rationale for affirmative action, there may be contexts in which individualized inquiries are unnecessary because the legacy of racist treatment is so obvious. For example, a majority of the Supreme Court refused to acknowledge the history of subordination against blacks in the city of Richmond, "the cradle of the Old Confederacy," when it overturned its affirmative action program in *City of Richmond v. J.A. Croson Co.*<sup>89</sup> Because racism is a group experience, defined by an actor's prejudice based on that group membership, one can never define racism entirely on an individualized basis. All I am suggesting is that *sometimes* racism is visited upon individuals in varying degrees. When we have limited resources and want to use those resources to overcome that group-based experience of subordination, we should use those resources as effectively as possible. Devoting those resources preferentially to the individuals who we can identify as having been the most unfortunate victims of racism makes sense. But even as we make those individualized decisions of who within the category of "black" is most deserving of affirmative action, we should not lose sight of the fact that racism is a group-based experience. Nearly all of the individuals within the category "black" may be more deserving of ameliorative treatment than nearly all of the individuals within the category "white," yet the black-white difference should not obscure the differences among the individuals within the group "black." Moreover, we may want to develop some rules to guard against subjectivity undermining the entire process. As I will discuss in Part V of this Article, we can learn about constructing individualized models by considering how they have been developed in the disabilities context. We do not have to entirely throw out all considerations of group-based experiences to improve upon them by including individualized aspects.

## 2. *Transracial Adoptions*

The National Association of Black Social Workers (NABSW) has strongly influenced our adoption and placement policies through its 1972 position paper

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<sup>89</sup> See 488 U.S. 469, 561 (1989) (Blackmun, J., dissenting).

in which it strongly argued against the adoption of black children by white families.<sup>90</sup> Although the NABSW may have made an important contribution to our understanding of the best interests of black children seeking family placement, it has also perpetuated stark black-white thinking about society. Its position paper states, "Our society is distinctly black or white and characterized by white racism at every level. We repudiate the fallacious and fantasied reasoning of some that whites adopting Black children will alter that basic character."<sup>91</sup> Unfortunately, in trying to protect the interests of black children, the NABSW ignored the interests of the growing number of mixed-race children by assuming that we can easily divide society into black and white categories.

The NABSW position paper has generated extensive discussion on the topic of transracial adoptions.<sup>92</sup> Authors generally debate whether blacks face cultural genocide if black children are made available for adoption by white couples, or whether black children suffer so much from the foster care system that they are better off placed with a white family than allowed to languish in that system. In general, authors seem to recognize the cultural benefits of placing black children with black families, but often also recognize the practical difficulties that make such placements difficult.

These authors tend to be concerned about preserving black culture and serving the best interests of black children, but they give little attention to how we define "black." In particular, they ignore that many children available for adoption are mixed-race, rather than exclusively white or black.<sup>93</sup> Mixed-race

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<sup>90</sup> Forde-Mazrui, *supra* note 43, at 925-26.

<sup>91</sup> *Id.* at 926 (quoting NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, POSITION PAPER (Summer 1973)).

<sup>92</sup> See, e.g., Jo Beth Eubanks, *Transracial Adoption in Texas: Should the Best Interests Standard Be Color-Blind*, 24 ST. MARY'S L.J. 1225 (1993); Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER J. 39 (1993); Forde-Mazrui, *supra* note 43; Timothy P. Glynn, *The Role of Race in Adoption Proceedings: A Constitutional Critique of the Minnesota Preference Statute*, 77 MINN. L. REV. 925 (1993); Joan Mahoney, *The Black Baby Doll: Transracial Adoption and Cultural Preservation*, 59 UMKC L. REV. 487 (1991); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51 (1990-91).

<sup>93</sup> Although I have not seen figures on the number of mixed-race children available for adoption, it appears that the number of such children is increasing. The number of black-white interracial marriages increased from 65,000 in 1970 to 218,000 in 1988. Perry, *supra* note 92, at 52 n.4. In 1984, there were approximately one million mixed-race children in the United States. Kathi Overmier, *Biracial Adolescents: Areas of Conflict in Identity Formation*, 14 J. APPLIED SOC. SCI. 157, 158 (1990); see also Sandor, *supra* note 16, at 39 (presenting statistics on interracial births).



children<sup>94</sup> are usually lumped into the category "black" with the assumption that steps need to be taken to preserve their black heritage, without considering whether we are using family law to *create* rather than to preserve cultural heritage.<sup>95</sup> In other words, when we assume that all mixed-race children should be treated as if they are black in the context of family placements, we are sending the message that these children should be classified and treated as if they are black.

The fact that commentators generally ignore in discussing the adoption of multiracial children is what the family composition of these children would be absent adoption. In many of the reported cases of multiracial children, the biological mother is white and the biological father (who is not the mother's husband) is black.<sup>96</sup> Given our socially constructed system of childrearing, the child most likely would have been raised in a white household absent adoption. Ironically, when we classify the mixed-race child as black and place him or her in a black family, we transport the child to a different family situation than he or she would have experienced absent adoption. Although some commentators consider transracial adoptions to be cultural genocide for black children, they ignore the difficulty in making a cultural genocide argument when multiracial children with white biological mothers are placed in white families. By lumping together all children with at least one biological black parent into the category "black" for adoption purposes, we help construct a larger category of "black" than would exist absent adoption.<sup>97</sup>

In one case, *Reisman v. Tennessee Department of Human Services*,<sup>98</sup> the court recognized the "bi-racial" background of a child and concluded that "bi-racial children shall be placed in foster homes and in adoptive homes with bi-

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<sup>94</sup> By the term "mixed-race children," I will be referring to children who are part black and part white because that is the most common example of mixed race discussed by the courts. Interestingly, I have found no cases involving, for example, a child with a Hispanic parent and a black parent, although that combination is probably not unusual. It seems that racial classification issues most frequently arise when the child is white and black, which probably reflects our culture's preoccupation with the purity of the white race.

<sup>95</sup> See, e.g., *Farmer v. Farmer*, 439 N.Y.S.2d 584 (N.Y. Sup. Ct. 1981); *In re Davis*, 465 A.2d 614 (Pa. 1983); *Ward v. Ward*, 216 P.2d 755 (Wash. 1950).

<sup>96</sup> See, e.g., *Drummond v. Fulton County Dep't of Family and Children's Servs.*, 547 F.2d 835 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978); *Reisman v. Tennessee Dep't of Human Servs.*, 843 F. Supp. 356 (W.D. Tenn. 1993).

<sup>97</sup> The literature on the construction of race typically argues that white society has unilaterally defined the category "black." See, e.g., Gotanda, *supra* note 21. Nonetheless, the labeling of mixed-race children in the adoption context has not occurred exclusively by white society. Some members of the black community have insisted on considering mixed-race children to be black for adoption purposes. See, e.g., Fenton, *supra* note 92.

<sup>98</sup> 843 F. Supp. 356.

racial families if possible."<sup>99</sup> But the court never defines exactly what it means by "bi-racial families." Ordinarily, if no adoption takes place and the nuclear family stays intact, a mixed-race child is raised by parents of two different races—I will assume white and black for this discussion. Those parents do not have the same racial makeup as the child who is half white and half black. The only way that child would share the racial makeup of her parents is if the parents were each half white and half black (a possible but not very likely result). In what sense, one must wonder, is it better for a mixed-race child to have parents of two different races rather than two parents of the same race? In neither case does the child really fully share her racial heritage with her parents.<sup>100</sup>

The court's use of its term "bi-racial" also does not seem to appreciate that nearly all blacks and many whites are of mixed-race background in the United States.<sup>101</sup> The term "bi-racial," as used by the court, seems to be limited to the situation in which a child has a white and a black parent. What happens, one must wonder, when the adoptive child grows up and bears a child? She was a

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<sup>99</sup> *Id.* at 361–63, 365 (discussing "bi-racial culture" and making legal conclusions). In *Drummond*, 547 F.2d 835, the social service agency appears to have belatedly acknowledged the adoptive child's mixed-race heritage when, after removing him from the white family with whom he had lived happily for two years, it attempted at least two placements with mixed-race couples, one of which was apparently unsuccessful, before he had reached the age of five. Larry I. Palmer, *Adoption: A Plea for Realistic Constitutional Decisionmaking*, 11 COLUM. HUM. RTS. L. REV. 1, 7 (1979). The agency's belated recognition of the child's mixed-race heritage accentuated "foster care drift," but did little for the well-being of the child. Randall Kennedy has called race-conscious placements such as the one in *Drummond* "scandalous." Kennedy, *supra* note 44, at 1818 n.305.

<sup>100</sup> Moreover, it is not unusual in our society for a child to be raised by one parent. A mixed-race child who is raised by one parent will therefore often be raised by a white parent or a black parent, but not by a mixed-race couple. Accordingly, a mixed-race couple adoption rule often does not replicate the family structure that that child would have had in the absence of adoption.

<sup>101</sup> As Professor Harris notes,

It is not at all clear that even the slaves imported from abroad represented "pure Negro races." . . . [M]any of the tribes imported from Africa had intermingled with peoples of the Mediterranean, among them Portuguese slave traders. Other slaves brought to the United States came via the West Indies, where some Africans had been brought directly, but still others had been brought via Spain and Portugal, countries in which extensive interracial sexual relations had occurred. By the mid-nineteenth century it was, therefore, a virtual fiction to speak of "pure blood" as it relates to racial identification in the United States.

Harris, *supra* note 29, at 1740 n.141.

“bi-racial” child who grew up in a white household. If she bears a child with a white man, is her child still “bi-racial”? What if she bears a child with a black man? Is the child still “bi-racial” or will social convention cause the child to be considered black? The “bi-racial” category, as used by the court and commentators, seems to reflect only the situation in which a child is exactly fifty percent white and fifty percent black. It is not a term that reflects a spectrum; it simply designates a new point—the middle—on the bipolar racial scale. Ironically, that middle point probably does not even exist in the cases to which it is being applied, because the parent who is labeled “black” probably is the product of a mixed-race heritage. Thus, although it might make sense abstractly to recognize the category “bi-racial” and use that category to find homes for “bi-racial” children, the category is actually an unworkable one. Nearly all of us are, in fact, multiracial, and it distorts reality further to consider only the child with one white and one black parent to be in a middle category.

These classification questions are challenging because the courts do not define the race of a child in a vacuum. The fact that a court recognizes a child as mixed-race will not necessarily cause society to treat the child as mixed-race. Society may still choose to treat the child as if she is black. If a court, for example, insists on giving no racial preference to black parents over white parents in the adoption of a mixed-race child, and the child is eventually placed with white parents, the child may still face unfavorable treatment by friends, classmates, teachers, employers, and health care workers who consider the child to be black. Some people may therefore argue that we should try to place the mixed-race child with a black family so that the child will learn how to deal with a racist society.<sup>102</sup> But such a preferential policy makes the assumption that the best way to learn to deal with society’s classification scheme is to adopt it as part of one’s self-identity. That presumption is dangerous because it puts the courts and social service agencies in the position of helping to perpetuate an arbitrary classification system. While some people may consider such a racial classification system in the adoption context to be ameliorative, it also helps perpetuate the subordinating “one drop of blood” rule for racial classification. I am therefore suggesting that racial preference policies for adoption of mixed-race children do not present exactly the same problems as they do for black children. Classifying a mixed-race child as black and thereby preferentially placing her in a black home promotes a racist and subordinating classification system.

In sum, I believe that we get a different perspective on the transracial adoption controversy when we examine it in the context of a multiracial child. First, we see that many of the children whom the courts and social agencies

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<sup>102</sup> See, e.g., Fenton, *supra* note 92, at 60–61.

have unreflexively labeled "black" for adoption purposes are in fact multiracial.<sup>103</sup> It is therefore too simplistic to say that these cases raise issues of transracial adoption only when a white couple or individual tries to adopt a multiracial child. Second, we see that our goal should be to respect an individual's full racial heritage, rather than to distort one aspect of it. When courts or social agencies distort one aspect of that racial heritage, they help perpetuate our racist "one drop of blood" rule. Nonetheless, just as we should stop transferring what is considered by some commentators to be good social policy for black children to the context of multiracial children, we should also be careful not to transfer these lessons from cases involving multiracial children to cases involving black children. Our policy of preferring black parents for a black child may be beneficial in terms of preserving racial heritage and even teaching a child how to deal with the racism of our society.<sup>104</sup> My point is simply that stretching that policy to include all multiracial children with a drop of African-American blood reinforces racism, rather than the best interests of the child. By taking that step, we are helping to construct a bipolar racial model that is disrespectful to the genuine mixed racial heritage of that child. Children should not be the instruments of such social engineering.

How then could we really move toward a spectrum of race rather than false polarities? I would suggest that we begin by truly investigating our racial heritage. The assumption would be that each of us is of mixed racial heritage, and the challenge would be to fully discover our own family trees. If the child in the *Reisman* case, for example, could be determined to have ancestry from Africa, Europe, and North America, then we could hope that that child would be taught to honor and value that mixed racial heritage. It is wrong to assume, however, that only parents who share a child's identical racial background

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<sup>103</sup> In talking to my friends who have engaged in what are commonly described as transracial adoptions, I have been struck by how many of them indicate that the biological mother was white and the biological father was black. In one case, a friend, who is an adoptive mother, told me that the white biological mother of her adoptive daughter had two children by the same black man to whom she was not married. One of the children was dark and the other was light. The mother relinquished only the darker child for adoption. My friend, however, who was considered to have engaged in a transracial adoption, shared many physical characteristics with the biological mother who would have otherwise raised the child as a single parent. I believe that the term "transracial adoption" is a misnomer in that context, because the child was transferred from one white mother to another white mother. Although it is important for the white mother in this context to fully respect the child's racial heritage, there is no reason for her to face a higher burden to qualify for adoption because of the purportedly transracial nature of the adoption.

<sup>104</sup> Since my argument is premised on the need to engage in more individualized understandings of our racial heritage, I do not have sufficient information to know how important it may be to some or many black children to have black adoptive parents.

would try to honor and respect the child's racial heritage. Outside the adoption context, adults who marry someone of another race and bear children with that person routinely raise children who are of mixed race. We expect them to honor and respect a heritage to which they do not directly belong. By sending the mixed-race child to only a mixed-race household, we attempt to do the impossible—give each child parents with racial backgrounds identical to the child's own. That result does not always occur outside the adoption context, and there is no reason to artificially force it into the adoption context.

A problem with this thesis is that much African heritage was lost through forced deportation and enslavement. Whereas many people of European heritage can trace their families back to a specific country, many people of African heritage cannot do this because of the coercive nature of their voyage to the United States. Africa is a large continent, and it is unfortunate when a child cannot trace his or her heritage back to a specific country or region on that continent. For the child of African heritage, the task of tracing back ancestry may become a lesson in the trials of forced enslavement. And, for a mixed-race child, it may lead "a descendant to an irreconcilable slave and slave-owning genealogy."<sup>105</sup> As we begin to acknowledge the category of "mixed-race," we may also take the opportunity to break down the monolithic category of "Africa" and discuss the many countries on that continent. Such discussions not only may help children of African heritage to learn more about their heritage, but may also help all of us to move beyond our monolithic thinking about Africa.

A final difficulty in the adoption context is confidentiality. Children who are adopted always have special problems in tracing their heritage because of the confidentiality of the adoption proceedings. Nonetheless, if their racial heritage is to be meaningfully honored and respected, it would seem important for the adoption agency to collect as much information as possible while the birth mother and father may be known to it. Rather than classifying a child as black or mixed-race, it would be helpful to learn as much as possible about what kind of African or other heritage the child may have. If this information is

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<sup>105</sup> Zack has therefore argued,

[I]t is now clear that the form of black family history is inherently problematic in comparison with the form of white family history. Not only does black family history contain self-undermining recollections of being oppressed, but its racial diversity may lead a descendant to an irreconcilable slave and slave-owning genealogy. If one would liberate oneself through identification by means of family history, one may also have to liberate one's ancestors.

ZACK, *supra* note 72, at 65.

communicated to the adoptive parents, then they can try more faithfully to learn about that heritage and to imbue in the child a sense of pride about that heritage.

Thus, a more individualized approach could create better social policy in the contexts of affirmative action and transracial adoption. Pragmatically, we may need to retain the use of some group-based categories in the affirmative action context to meet goals other than remedying a history of subordination. In the adoption context, however, it is hard to see any need for group-based rules. Adoption, by definition, is a highly individualized process to which we devote considerable social resources. There is no excuse for social agencies and courts to blindly perpetuate the "one drop of blood" rule without fully investigating the best interests of the child.

### III. SEXUAL ORIENTATION

The term "bisexual" is rarely recognized by courts and legislatures. This lack of recognition causes serious difficulties for courts and legislatures because they often want to disqualify or penalize the "true homosexual" from various jobs and opportunities, but do not necessarily want to disqualify or penalize *everyone* who has had a same-sex sexual experience. By only seeing sexual experiences as bipolar, rather than on a continuum, they often have serious definitional problems concerning individuals who have had sexual experiences with members of both sexes.

In this part of the Article, I will first survey the definitions that have been used to accord punitive treatment on the basis of sexual orientation. In some cases, these definitional schemes show that society saves its strongest disapproval for those individuals who identify as "true homosexuals" and never move toward the bi categories. In other cases, however, we will see that commentators save their sharpest disapproval for bisexuals they believe could (and should) "choose" to engage exclusively in heterosexual activity. "True homosexuals," by contrast, get their sympathy because they cannot "stop themselves." Because of the element of choice that is perceived to exist in this context, we will see varying assessments of how we should treat individuals in the bi category, although predominantly, it is fair to say that social policies have targeted the "true homosexual" for the most substantial punitive measures.

After surveying our definitional schemes, I will then consider how we could develop ameliorative policies on the basis of sexual orientation. Increasingly, society is trying to develop policies which will enable gay, lesbian, and bisexual people to obtain the benefits previously limited to married heterosexuals. It may soon even be possible to argue for affirmative action on

the basis of sexual orientation. This movement requires us to begin to develop benign or ameliorative definitional categories. Who should be counted? How should the appropriate category be defined for benign or ameliorative purposes? Should bisexuals be included? It is important to think about these questions now, rather than in a reactive, urgent mode at a later time.

### A. *Negative Categorization*

#### 1. *The Military*

The military's awkward definitional scheme for the purpose of discharging the "true homosexual" has been widely discussed elsewhere,<sup>106</sup> but deserves brief mention. Until recently, the military could decide to retain a "known homosexual" if the following conditions were met:

A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

- (1) That the member has engaged in, attempted to engage in, or further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—
  - (A) such conduct is a departure from the member's usual and customary behavior;
  - (B) such conduct, under all the circumstances, is unlikely to recur;
  - (C) such conduct was not accomplished by use of force, coercion, intimidation;
  - (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
  - (E) the member does not have a propensity or intent to engage in homosexual acts.<sup>107</sup>

This regulation attempted to protect the practicing bisexual who was willing to express disdain for his or her same-sex sexual activity. Since the military apparently believed that a person was either homosexual or heterosexual, stating a proclivity for heterosexual sexual experiences was probably sufficient to avoid discharge. But the "true homosexual" who had no proclivity for

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<sup>106</sup> See, e.g., Judith H. Stiehm, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685 (1992) (describing how the military's exclusion of gays, lesbians, and bisexuals has changed over time).

<sup>107</sup> 10 U.S.C.A. § 654(b) (West Supp. 1994).

heterosexual sexual activity was at grave risk for discharge.

## 2. *New Hampshire*

A more interesting and less discussed example of definitional problems in the sexual orientation area is that of the State of New Hampshire. In 1987, the House of Representatives of the State of New Hampshire decided that it wanted to exclude homosexuals from being adoptive or foster parents, as well as day care workers.<sup>108</sup> In order to create this exclusion, it had to define who was a homosexual. The definition that the state legislature created states, "[A] homosexual is defined as any person who performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person of the same gender . . . ."<sup>109</sup>

This definition divided people into two stark categories: heterosexual or homosexual. Any act of same-sex sexual activity made a person homosexual. Moreover, homosexuality was defined exclusively on the basis of sexual experience. A celibate homosexual did not exist.

The New Hampshire House of Representatives was nonetheless concerned about the constitutionality of such a statute. Pursuant to the New Hampshire Constitution's rules regarding advisory opinions, it sought advice from the New Hampshire Supreme Court.<sup>110</sup>

The New Hampshire Supreme Court (including David Souter) advised the state legislature that this bill would be constitutional in the adoption and foster care settings, but that it swept too broadly in the day care setting.<sup>111</sup> In determining the constitutionality of the bill, the court, however, was troubled by the definition of homosexuality. It stated, "This very narrow definition of homosexual behavior contains no requirement that the acts or submission thereto be uncoerced, nor does there appear to be any temporal limitation regarding when the acts are to have occurred."<sup>112</sup> Because the court believed that the statute swept too broadly in defining homosexuality, it decided to assume that the homosexual acts had to be voluntary and knowing.<sup>113</sup> Moreover, the court created this temporal rule:

[W]e interpret the definition's present tense usage to mean that the acts

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<sup>108</sup> *In re* Opinion of the Justices, 530 A.2d 21, 22 (N.H. 1987) (describing New Hampshire H.R. 70).

<sup>109</sup> *Id.* (quoting New Hampshire H.R. Res. 32).

<sup>110</sup> *Id.* at 21-22 (quoting New Hampshire H.R. Res. 23).

<sup>111</sup> *Id.* at 25.

<sup>112</sup> *Id.* at 24.

<sup>113</sup> *Id.*



bringing an individual within the definition's ambit must be or have been committed or submitted to on a current basis reasonably close in time to the filing of an application for licensure or a petition for adoption. This interpretation thus excludes from the definition of homosexual those persons who, for example, had one homosexual experience during adolescence, but who now engage in exclusively heterosexual behavior.<sup>114</sup>

This commentary by the state supreme court was an attempt to narrow the New Hampshire definition to include only the "true homosexual." A young person who engaged in homosexual activity could be excluded from the definition based on the combination of the coercion and timing exceptions. Because the event had occurred in the distant past, one did not have to consider this event to be indicative of the individual's current identification. The fact that the event had not recurred might even be evidence that the individual was repulsed by such activity. Moreover, if the individual could allege coercion, then the label "homosexual" would not apply at all.

In 1987, after the New Hampshire Supreme Court issued its advisory opinion, the state legislature amended existing statutes to prohibit homosexuals from adopting children and from becoming foster parents.<sup>115</sup> It used the following definition of homosexuality: "any person who knowingly and voluntarily performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person of the same gender."<sup>116</sup> The legislature therefore chose to explicitly impose the requirement that the sexual behavior be knowing and voluntary, but it did not explicitly impose a temporal requirement. It retained the present tense usage, but left open the question of how recently one would have had to engage in a homosexual act to be deemed a homosexual. Would the act have had to occur during the previous day, the previous week, the previous year, or the previous decade? All of these interpretations are awkward because they require a past tense interpretation of the statutes. Certainly the legislature did not mean to require that the person be engaging in a homosexual sexual act while being interviewed about his or her suitability to parent!

Although the legislature was alerted to the ambiguity problem with respect to timing, it did nothing to solve the problem.<sup>117</sup> It continued to believe that it

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<sup>114</sup> *Id.*

<sup>115</sup> See N.H. REV. STAT. ANN. §§ 161:2(IV), 170-B:4 (1994). Based on the court's advisory opinion, it dropped the ban on homosexuals working as day care workers.

<sup>116</sup> N.H. REV. STAT. ANN. §§ 161:2(IV), 170-B:2(XV) (1994).

<sup>117</sup> The ambiguity problem did not end with this case. Foster parents unsuccessfully challenged the new rules on grounds of ambiguity. See *Stuart v. State Div. of Children and Youth Servs.*, 597 A.2d 1076 (N.H. 1991). The foster parents unsuccessfully argued that they could not certify that there were no homosexuals in their household because the

could achieve its intended purpose with such a definition by neatly dividing the world into categories of "true homosexual" and the normal heterosexual.

Why did the state not come up with a better definition to achieve its purpose? Arguably, the state deliberately wanted to exclude all individuals from being adoptive or foster parents who had ever had a homosexual experience at any time in their lives. Thus, it deliberately kept the language broad. But because the state supreme court rejected that possibility as overbroad, it is reasonable to assume that that is not what the legislature intended.

The one modification that the legislature did devise may illuminate its intentions. The legislature created an exception for people who could claim that their homosexual experiences were not engaged in voluntarily or knowingly. Although the legislature may not believe that many people have had homosexual experiences, it apparently did believe that many people have had coerced homosexual experiences. In other words, it was more important to provide an exception for coercion than to provide an exception for the passage of time. The legislature may have believed that its exception was sufficiently broad, because it accepted the stereotype that adolescent homosexual experiences tend to be the result of coercion by an older gay man. Thus, a temporal exception would not be needed because it would be redundant with a coercion exception.

In sum, the State of New Hampshire initially created a legal disability for homosexuals without considering how hard it might be to define the "true homosexual." When confronted with definitional difficulties by a state supreme court that largely accepted its political and moral agenda, the legislature did not budge very much. It revised its definition to better include only the "true homosexual" by allowing an individual with homosexual experiences to argue that he or she was blameless because the experiences had been coerced or unknowing. Because no proof is required to establish coercion, one can also understand the legislature as having created an exception for people who are willing to repudiate their past homosexual experiences as coercive rather than consensual. These individuals would therefore not be the "true homosexual" who openly acknowledges his or her sexual orientation.

In the State of New Hampshire, therefore, a "true homosexual" is someone who has engaged in same-sex sexual activity and will not express regret concerning those experiences by claiming that they were coercive. The State of New Hampshire did not intend to exclude all individuals who had engaged in same-sex sexual experiences from being adoptive or foster parents. It only intended to exclude those individuals who felt positively about their same-sex sexual partners. A closeted, self-deprecating homosexual is considered to be a more appropriate parent than an open, proud homosexual. The State of New

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definition of homosexuality in the statute was so vague. *Id.*

Hampshire, like the military, seems to prefer self-deprecating homosexuals who might be able to hide behind their bisexuality to open, gay, and proud homosexuals.

### 3. *Sodomy Laws*

One final example shows that social policies do not always target the “true homosexual” for mistreatment; sometimes, bisexuals can be the central target. Professors Arthur Murphy and John Ellington have written a law review article in which they try to find some middle ground in the gay rights debate.<sup>118</sup> Ironically, in their search for a middle ground, they propose blatant discrimination against the middle—bisexuals! They suggest that existing sodomy laws be modified to make it illegal to engage in sexual intercourse by mouth or anus with another person of the same sex, unless the accused can prove by a preponderance of the evidence that the individual with whom he or she had sex was “reasonably believed by the accused to be a true homosexual.”<sup>119</sup> A “true homosexual” is defined as an individual whose “sexual orientation is predominantly towards persons of the same sex as himself or herself.”<sup>120</sup> They realize that an individual who has sex with a bisexual would be subject to legal sanction, but justify that decision by arguing that it is permissible to direct the bisexual to “make a choice”:

The only people whom the statute inevitably frustrates are those (rare?) bisexuals who are powerfully, equally attracted to both men and women—the truly “double gaited” in Damon Runyon’s phrase. But as the majority of the justices recognized in *Bowers*, a state may define and proscribe deviant behavior in its pursuit of secular morality. A state may frustrate a bisexual’s desire for homosexual intercourse just as it may frustrate any adult’s libidinal hankering for a fifteen year old Lolita, a close adult relative, a prostitute or a willing animal.<sup>121</sup>

Murphy and Ellington’s proposal is interesting because it openly condemns bisexuals (while tolerating the “true homosexual”) and turns the New Hampshire perspective on its head. While the legislature in New Hampshire is determined to impose legal sanction on the “true homosexual,” Murphy and Ellington are determined to provide limited protection to the “true homosexual” while proscribing the same-sex conduct of the “true bisexual.”

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<sup>118</sup> Arthur A. Murphy & John P. Ellington, *Homosexuality and the Law: Tolerance and Containment II*, 97 DICK. L. REV. 693 (1993).

<sup>119</sup> *Id.* app. A at 709.

<sup>120</sup> *Id.* app. at 709–10.

<sup>121</sup> *Id.* at 698. (footnotes omitted).

Their comments reveal that, to some people, bisexuals are the most threatening category, whereas to other people, "true homosexuals" are the most threatening. In either case, social policy is created to try to conform human behavior to a set of arbitrary norms.

In sum, social policies act coercively to construct individuals' sexuality. These classifications substantially affect people's lives. Children who could be adopted by loving and committed homosexual parents in New Hampshire and elsewhere are languishing in foster care. The quality of our military is eroded through open acceptance of homophobia. Gay and lesbian people are routinely denied family rights and other benefits because of their "illegal" lifestyle. These definitions are not simply irrational attempts to classify human behavior and identity, but are powerful mechanisms to perpetuate the subordination of gay, lesbian, and bisexual people in society. And unfortunately, instead of consistently arguing for the elimination of these debilitating categories, some authors such as Murphy and Ellington are arguing for the creation of yet new debilitating categories.<sup>122</sup>

### B. Positive Categorization: Affirmative Action

Affirmative action is not usually discussed in the context of gay rights. Generally, the gay rights movement is silent about affirmative action out of fear that the Christian Right will use such talk as an excuse to undermine efforts to achieve more basic nondiscrimination.<sup>123</sup> Nonetheless, some authors have begun to tentatively speak about affirmative action for the gay and lesbian community, and some institutions have even begun to implement affirmative action programs on the basis of sexual orientation.<sup>124</sup>

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<sup>122</sup> Murphy and Ellington are not alone in proposing new initiatives to penalize gay, lesbian, and bisexual people. Recent initiatives in Oregon, Colorado, and elsewhere have tried to repeal the minimal nondiscrimination advances made by gay, lesbian, and bisexual people in the last 25 years. *See id.* apps. B-C at 710-11 (Oregon and Colorado initiatives).

<sup>123</sup> *See* Jeffrey S. Byrne & Bruce R. Deming, *On the Prudence of Discussing Affirmative Action for Lesbians and Gay Men: Community, Strategy, and Equality*, 5 STAN. L. & POL'Y REV. 177, 179 (1993). Proposed federal legislation to create nondiscrimination protection on the basis of sexual orientation explicitly *prohibits* affirmative action. *See* S. 2238, 103d Cong., 2d Sess. § 6(b) (1994) (sponsored by Senator Kennedy) ("A covered entity shall not give preferential treatment to an individual on the basis of sexual orientation."). If this bill became law, the institutions that have publicly announced use of affirmative action for lesbians and gay men would presumably be in violation of the law.

<sup>124</sup> *See* Byrne, *supra* note 13; Byrne & Deming, *supra* note 123. Northeastern University has also recently announced an affirmative action program for lesbians and gay men. *See* Alice Dembner, *Northeastern Takes Steps to Hire More Gays*, BOSTON GLOBE, June 28, 1994, at 20; Glen Johnson, *University Starts Recruiting Gay Faculty*, RECORD,

Because of the expected controversial nature of how to implement affirmative action on the basis of sexual orientation, it is very important that we have a sound argument for how and why to implement such a program. A good place to begin in having such a discussion is to determine why we consider an affirmative action policy to be appropriate. Jeffrey Byrne and Bruce Deming justify such a policy by reference to the history of disadvantage faced by gay and lesbian people. Nonetheless, there is no monolithic treatment on the basis of sexual orientation, as Byrne and Deming acknowledge in the following statement:

For gay and lesbian people *qua* gays and lesbians, nondiscrimination may more effectively deliver the promise of substantive equality. We are raised as presumptively heterosexual members of families belonging to every race, religion, and socioeconomic class, and as Representative Barney Frank explains, "have not on the whole in this country suffered the kind of systematic discrimination in the allocation of educational resources that have affected other groups." Neither are our economic opportunities and social mobility as a group as systematically circumscribed as are those of African Americans and other groups.<sup>125</sup>

This important acknowledgement furthers my general argument in this Article about how the first rationale for affirmative action (disadvantage) should be implemented. It may be the case that some gay, lesbian, or bisexual people have been largely shielded from the effects of prejudice. On the other hand, it may be the case that an individual gay, lesbian, or bisexual individual has faced dramatic discrimination that has disadvantaged him or her in an educational institution or workplace.<sup>126</sup> He or she should be entitled to tell that story

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June 27, 1994, at A6. Nonetheless, some institutions have tried to distance themselves from suggestions that they engage in affirmative action on the basis of sexual orientation. *See, e.g.,* Anthony Flint & Kay Longcope, *Kennedy School Shows Caution on Gay Initiative*, BOSTON GLOBE, Feb. 28, 1991, at 25 (reporting on school spokesperson's statement that institution does not recruit or admit students, staff, or faculty on the basis of sexual orientation despite a report recommendation that the institution engage in affirmative gay and lesbian recruitment).

<sup>125</sup> Byrne & Deming, *supra* note 123, at 185.

<sup>126</sup> For example, a friend of mine in college was cut off from her family both economically and emotionally after she "came out" to them. Her grades suffered that semester as she dealt with this traumatic event. Amazingly, her grades rebounded in the next semester as she developed positive strategies to deal with this problem. When she applied to graduate school, it would have been nice if she could have felt comfortable asking an admissions officer to discount that one semester's grades. By contrast, because my family was always very supportive of my sexual preferences, I could not say, when applying to graduate school, that my participation in the gay, lesbian, and bisexual

irrespective of how characteristic it is of all gays, lesbians, or bisexuals. The role model thesis, by contrast, would allow more group-based rather than individualized thinking.<sup>127</sup>

To further complicate the problem of individuality, we have to grapple with the problem of definitions. Who should be entitled to affirmative action protection? Should bisexuals, for example, be included? Little attention has been given to how to define the beneficiary group, in the sexual orientation context. One law firm has defined it as "self-identified gay men and lesbians," whereas another institution has defined it as "declared gay men, lesbians, and bisexuals."<sup>128</sup> Jeffrey Byrne, the only author that I have found who discusses how we should define the beneficiary group, argues that we should include bisexuals along with lesbians and gay men. He says, "[B]isexual persons have suffered oppression and invisibility such that the justifications articulated for affirmative action for lesbians and gay men warrant inclusion of bisexual persons in the beneficiary group. In particular, bisexual women and men face the same widespread societal and employment discrimination faced by lesbians and gay men."<sup>129</sup>

Byrne makes his argument for the purpose of extending protection of gay men and lesbians to bisexuals, but I believe his argument actually helps demonstrate the flaws in his basic categorization scheme. Bisexual individuals vary widely in terms of what that category means to them.<sup>130</sup> Individual F who

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community detracted from my grades. If a school had an affirmative action policy, I would argue that my friend, and not myself, would be entitled to that affirmative treatment. By contrast, I had a very unpleasant academic experience with a math professor who told me directly that he did not expect "girls" to excel in math and would therefore not answer my questions outside the classroom. Because he was also chair of the department, his attitude did deter me from continuing in math (previously my strongest subject). Had I applied to graduate school in math, I believe it would have been appropriate for me to ask a committee to understand the gaps in my math studies caused by my decision to forego further classes with this professor. My friend, who majored in the humanities, by contrast, had no overt experiences of sexism (that she shared with me) stemming from her gender; so, it would not have been appropriate to ask a graduate admissions committee to consider her gender when reviewing her application for graduate school. Of course, this example only speaks to the first justification for affirmative action—helping individuals overcome societal disadvantage. Other affirmative action rationales, such as increasing the role models for members of the gay and lesbian community, may have made it appropriate for both my roommate and myself to receive affirmative treatment in our chosen professions.

<sup>127</sup> See Byrne, *supra* note 13, at 69–70, 77–78 (acknowledging importance of role model theory).

<sup>128</sup> *Id.* at 92.

<sup>129</sup> *Id.* at 93.

<sup>130</sup> See generally Ruth Colker, *A Bisexual Jurisprudence*, 3 LAW & SEXUALITY: REVIEW OF LESBIAN AND GAY LEGAL ISSUES 127 (1993).

has had exclusive relationships with someone of the same sex may consider herself to be bisexual, along with individual G who is married to someone of the opposite sex and has never been sexually involved with someone of the same sex. Individual H may have recently had relationships with individuals of both sexes. For those three categories of people, the meaning of their sexual orientation might be entirely different in their lives. Individual F may have suffered extensive discrimination by individuals who considered her to be lesbian rather than bisexual. Individual G may have suffered virtually no discrimination because few people recognize that he considers himself to be bisexual. Individual H may have been treated as an outcast by both members of the heterosexual and homosexual communities because she does not seem to "fit in."<sup>131</sup> Before deciding that these bisexual individuals are deserving of affirmative action, I would therefore want to hear their histories. When affirmative action is being justified under the first rationale (disadvantage), I would want to hear how individuals' sexual orientations have disadvantaged them in their lives such that affirmative action makes sense.<sup>132</sup>

Because few institutions have adopted affirmative action plans on the basis of sexual orientation, we have an opportunity to develop those rules with a fresh start. Rather than mimic the rules that we have used in the race and gender areas, it makes sense to ask broad questions about the nature of these rules. Just as the Malones came "out" as black when affirmative action was adopted in Boston, gay, lesbian, and bisexual people can be expected to come "out" if affirmative action is adopted on the basis of sexual orientation. We need to have a mechanism to determine which of the Malones in our society are

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<sup>131</sup> A particular bisexual individual may be any one of those three characters during his or her lifetime. In fact, I have taken these stories from my own life experiences as a bisexual individual. We therefore need to recognize the fluidity of our sexual orientation in creating rules about the meaning of our sexual orientation in our lives.

<sup>132</sup> Even the role model thesis can break down in the context of bisexuals. For example, I consider myself to be a bisexual, but I am also married to a man. Although I am an "out" bisexual in that I openly acknowledge my sexual feelings and history, my sexual orientation is also largely hidden through my wearing of a traditional wedding ring. It is hard for me to see how I can plausibly be seen as a positive bisexual role model. By contrast, when I was involved with a woman (but still considered myself to be a bisexual), I am sure that I was perceived as a lesbian. In fact, I remember when I broke up with a woman and got involved with a man, I was told that it was too bad that I was dating a man because I had been such a good lesbian role model! It never occurred to the speaker that I had just become an excellent bisexual role model by openly changing the gender of my partner. I therefore believe that it can be difficult to serve as a bisexual role model, although I have found it to be true that students who identify as bisexual (or who are considering such identification) often seek me out for conversation. I may therefore serve as a role model for some students seeking to come to terms with their bisexual identity to some modest extent.

deserving of affirmative treatment, as well as a rationale for our affirmative action policy.

Byrne recognizes the definitional problems that might occur if we had affirmative action in this area, but discounts them because he argues that self-identification would be an accurate and fair way to deal with these definitional problems.<sup>133</sup> Moreover, he says that self-identification is not likely to present fraud problems for dishonest workers who want to benefit from affirmative action based on sexual orientation, because the stigma associated with gay or lesbian status is a sufficient deterrent.<sup>134</sup> I disagree with his argument because a worker who can say, "I'm bisexual although I am happily married to someone of the opposite sex," may not feel any stigma at all, especially if the workplace is truly free of homophobia.

But even if Byrne is correct that there is little risk of fraudulent self-identification, that response does not tell us who we believe is *deserving* of affirmative treatment. If our rationale for affirmative action is assisting individuals to overcome historical disadvantage, then we need to probe into individual experiences of disadvantage. But possibly, overcoming a history of disadvantage should not be our primary rationale in constructing affirmative action in the gay and lesbian context. The primary rationale might be creating positive gay, lesbian, and bisexual role models. In that case, we would want to make sure that individuals obtaining preferential treatment will be "out of the closet" and willing to work closely with the gay, lesbian, and bisexual community as a positive role model. Finally, if our primary rationale for affirmative action is to increase the diversity of ideas, then we need to probe whether an individual's sexual orientation is reflected in his or her work or scholarship. In sum, we need to be careful that we do not allow affirmative action to reflect stereotypes of the gay, lesbian, and bisexual community. By articulating our rationales for affirmative action carefully, we can devise affirmative action policies that are carefully tailored to meet those rationales. Not every gay, lesbian, or bisexual individual may qualify for affirmative treatment under such carefully tailored rationales.

Because affirmative action for gay, lesbian, and bisexual people is likely to be firmly resisted, it is especially important that we develop strategies that we believe will be effective. Deming and Byrne, in writing the first articles on this subject, already recognize the wide variation in the treatment of gay, lesbian, and bisexual people. Let us build on that recognition, rather than repeat the shortcomings of our racial experience. When we devise affirmative action programs to meet the first rationale (overcoming disadvantage), let us use affirmative action programs as an opportunity to share experiences of

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<sup>133</sup> Byrne, *supra* note 13, at 94-96.

<sup>134</sup> *Id.*



disadvantage to target appropriate beneficiaries, as well as to educate ourselves about the scope of mistreatment suffered by gay, lesbian, and bisexual people.

#### IV. GENDER

The bigender story is in many ways the most disturbing because we have typically had subordinating treatment of individuals who cross gender boundaries and have rarely begun to consider ameliorative treatment. Our treatment of gender-crossing is punitive in that we force hermaphrodites to have surgery at birth to "correct" their transgendered status,<sup>135</sup> while we treat transsexuals with contempt for choosing to have surgery as adults to conform their sexual genitalia to their perceived understanding of their gender.<sup>136</sup> Similarly, we treat transvestites and preoperative transsexuals punitively by refusing to tolerate their cross-dressing.<sup>137</sup> In each case, we insist that these individuals fit a bipolar model of gender and consider them to be clinically abnormal for failing to fall within the rigid bipolar model.

In order to understand the structure of the bipolar model, one must understand how the various bi categories are used. That story is complicated because the categories of transsexual, transvestite, androgyny, and hermaphrodite are themselves reflective of the obsessive need to categorize based on gender and sex. It is typical for commentators to try to distinguish neatly between transvestites and transsexuals by saying that both individuals may cross-dress, but that the transvestite does not desire to become anatomically the opposite sex.<sup>138</sup> In fact, the distinction between the transvestite and the transsexual is not clearly defined. For example, after a period of cross-dressing, a transvestite may decide that he or she is actually a transsexual and seek surgery. But then, the question arises whether the individual who identified as a transvestite was really a transsexual all along.<sup>139</sup> Annie Woodhouse defines the distinction between the transvestite and the transsexual as follows (using the male-to-female cross-dresser as her example):

Perhaps a more easily recognizable point of departure would be to consider the transvestite as a person who identifies himself as a man-who-dresses-as-a-woman. In contrast, the transsexual will identify himself as a woman who has

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<sup>135</sup> See Anne Fausto-Sterling, *How Many Sexes Are There?*, N.Y. TIMES, Mar. 12, 1993, at A29.

<sup>136</sup> See *infra* part IV.A.

<sup>137</sup> See *infra* part IV.A.

<sup>138</sup> See, e.g., *Phillips v. Michigan Dep't of Corrections*, 731 F. Supp. 792, 795 n.5 (W.D. Mich. 1990), *aff'd*, 932 F.2d 969 (6th Cir. 1991).

<sup>139</sup> See ANNIE WOODHOUSE, *FANTASTIC WOMEN: SEX, GENDER, AND TRANSVESTISM* 19 (1989).

the misfortune of a male body; the solution being, in his terms, hormone therapy and sex reassignment surgery. In referring to the importance of changing genital sex, April Ashley, a postoperative transsexual, comments that as a biological male, "my genitals were quite alien to me." Typically, the transvestite will display the opposite attitude, enjoying the best of both worlds.<sup>140</sup>

Another way that transvestites and transsexuals are often distinguished is that a transvestite usually cross-dresses occasionally, whereas a transsexual is a full-time cross-dresser. But this distinction becomes blurred in the case of the full-time cross-dresser who has not undergone sex reassignment surgery (and might not desire such surgery).<sup>141</sup> In such cases, Woodhouse explains the distinction as follows: "In many respects the differences between the transvestite and the so-called transsexual lie with their own perceptions and definitions of self: whether they consider themselves 'real women' or whether they see cross-dressing as an end in itself which allows partial entry into the world of femininity."<sup>142</sup>

Commentators also typically try to distinguish the transsexual and transvestite from the homosexual. Transsexuals usually do not want to be considered homosexuals; transvestites do not want to be considered transsexuals; and homosexuals often do not want to be considered transsexuals or transvestites.<sup>143</sup> Many male-to-female cross-dressers (be they transsexuals or transvestites) are sexually attracted to men. If the individual is a transvestite, then he is usually classified as a homosexual (or more commonly a "drag queen"). By contrast, if the individual is a preoperative transsexual, then the individual may identify as a heterosexual who is attracted to men, but is trapped in a man's body. The most interesting example that I have found of the struggle to differentiate within categories occurs in *Phillips v. Michigan*

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<sup>140</sup> *Id.* at 19–20.

<sup>141</sup> *Id.* at 46–47.

<sup>142</sup> *Id.* at 47.

<sup>143</sup> See *Phillips v. Michigan Dep't of Corrections*, 731 F. Supp. 792, 795 n.5 (W.D. Mich. 1990) (distinguishing between a transsexual, homosexual, and transvestite), *aff'd*, 932 F.2d 969 (6th Cir. 1991). Gay and lesbian groups seem recently to have become concerned with transgender issues. The 1993 march on Washington for lesbian and gay civil rights, for example, included transgender concerns in its list of concerns. See Dan Levy & David Tuller, *Transgender People Coming Out: Opening Up the World of Drag*, S.F. CHRON., May 28, 1993, at A1, A17. Nonetheless, transgendered individuals report that they have faced many obstacles from mainstream homosexuals who say that the presence of cross-dressers at gay marches and parades offends straight people and undermines overall support for the gay rights movement. *Id.*

*Department of Corrections*.<sup>144</sup> Plaintiff was an inmate who claimed to be a preoperative transsexual, but who was being denied estrogen and other treatment by prison authorities. Before incarceration, plaintiff had adopted a female name (despite retaining male genitalia) and was in a relationship with a man, which plaintiff characterized as heterosexual. While in prison, plaintiff was not receiving estrogen therapy, causing many of the female characteristics previously attained through treatment to reverse themselves.<sup>145</sup> Nonetheless, plaintiff considered herself to be a heterosexual, preoperative transsexual—not a homosexual, not a male, and not a transvestite. One could, however, have described plaintiff as a homosexual, male transvestite who was also a preoperative male-to-female transsexual. The categorization system therefore seems as important to the affected class (as a means of self-identity) as to the society at large (as a means of oppression).

Interestingly, we therefore see a three-part, differentiated scheme within the middle of the larger, bipolar gender classification scheme. At each highly differentiated point within the middle, we have individuals who are challenging sex or gender categories. Transvestites retain a traditional conception of their biological sex while challenging gendered clothing rules for appearance. Homosexuals retain a traditional conception of their biological sex while challenging gendered rules for an appropriate sexual partner. And transsexuals challenge a traditional conception of their biological sex while trying to conform to the gender rules for the sex with which they identify.

The spectrum, however, becomes much more complicated if we include hermaphrodites. Hermaphrodites are hard to place on the spectrum because they are typically invisible rather than on the spectrum. By engaging the hermaphrodite in surgery at birth, we assign that person to one pole of the bipolar spectrum, rather than allowing the person to live as a transgendered person. In the race area, commentators are worried about cultural genocide of blacks through interracial adoption.<sup>146</sup> Here, we have a different kind of cultural genocide. Instead of allowing a third, fourth, and even fifth sex to develop (given the three types of hermaphrodites),<sup>147</sup> we engage in surgery before the age of consent to eliminate each of these alternative genders and to fix an individual purely in the male or female category. Thus, hermaphrodites become an invisible aspect of the male and female poles.

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<sup>144</sup> 731 F. Supp. 792.

<sup>145</sup> *Id.* at 794.

<sup>146</sup> See *supra* part II.B.2.

<sup>147</sup> Hermaphrodites constitute three subgroups: (1) they possess one testis and one ovary, (2) they possess testes and some aspects of female genitalia, but not ovaries, or (3) they have ovaries and some aspects of male genitalia, but lack testes. Fausto-Sterling, *supra* note 135, at A29.

Similarly, one might argue that a postoperative transsexual who has had successful surgery could fit at one of the poles rather than at the middle. Whether the postoperative transsexual fits into a pole depends on whether he or she "passes." The postoperative transsexual who does not pass is left in the indeterminate middle category (for example, with respect to sex-segregated bathrooms)<sup>148</sup> with neither men nor women wanting to claim him or her as their own.

The final group to add to the gender spectrum is individuals who are considered to be androgynous. The term "androgyny" does not inherently present a new category, but instead, presents a less negative way to describe some of the other categories. The word "androgyny," derives from the Greek "andro" (male), and "gyne" (female). It historically described individuals who were in possession of both sets of sexual organs—a hermaphrodite.<sup>149</sup> Today, however, androgyny is usually understood to be a blending of gender, not sexual organs, and is even considered to be "politically desirable."<sup>150</sup> Thus, we use words with negative connotations—transsexual, transvestite, and hermaphrodite—to describe individuals who cross gender lines, while we also recognize (at least in some quarters) a new gender ideal—androgyny. The existence of the "androgyny" category may reflect our attempt to move beyond the sharp gendered divisions (at least when biological modifications have not occurred), while we also retain punitive treatment for the other three transgendered categories. Thus, one could imagine an individual saying, "No, I am androgynous and not a transsexual, transvestite, or hermaphrodite," to avoid punitive treatment. In reality, however, I have not seen an example of anyone avoiding punitive treatment for his or her transgendered status in that way.

A final and interesting gendered aspect to these categories is our assumption as to whether men or women are predominantly in these categories. The popular literature suggests that transsexualism is a phenomenon exclusive to biological men who wish to become women.<sup>151</sup> In fact, there have always been both male and female transsexuals.<sup>152</sup> The invisibility of female-to-male transsexualism is itself an example of gender hierarchy. According to Dr.

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<sup>148</sup> See *infra* part IV.A.

<sup>149</sup> Gaudoin, *supra* note 9, at 116.

<sup>150</sup> *Id.*

<sup>151</sup> See, e.g., JANICE G. RAYMOND, *THE TRANSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* (1979).

<sup>152</sup> See LESLIE MARTIN LOTHSTEIN, *FEMALE-TO-MALE TRANSSEXUALISM: HISTORICAL, CLINICAL, AND THEORETICAL ISSUES* 308-11 (1983) (arguing that the male-female sex ratios are approaching one-to-one); see also Amy Bloom, *The Body Lies*, NEW YORKER, July 18, 1994, at 38 (interviewing female-to-male transsexuals).

Leslie Lothstein, a leading clinician in the field,

The most critical reason why female transsexualism has been ignored clinically probably relates to the current social and political status of female sexuality, in which puritanical beliefs regarding female sexuality still have a pervasive influence on clinical practice. In addition, most sexual researchers are male, and their male-centered views (sometimes labeled as homocentric or patricentric) have probably been communicated to women who have been discouraged from applying to the gender clinics.<sup>153</sup>

The topic of transsexualism is therefore quite a challenging one in helping us to understand better our bipolar views on gender. Not only is the transsexual generally despised or feared because of his or her challenge to conventional gender and sex boundaries, but that challenge is often considered to be implausible when the individual is a woman.

Exploring the bi within gender therefore shows an enormous range of possibilities—all but one of which are despised by society for somewhat differing reasons. Moreover, each of the subgroups do not necessarily align with each other. They each do not want to share the “deviance” of the “other.” The despised nature of each of these subgroups reveals a great deal about our intense need for a rigid bipolar system. Because that bipolar system must be retained on both gender and sex lines, it is possibly harder to keep in place than in the other areas that we have investigated. Investigating the middle therefore helps us better see the rigidity of the poles. If we investigated solely the definition of maleness and femaleness, the rigidity of the poles might not be as obvious.

#### A. Punitive Treatment

Both preoperative transsexuals and transvestites cross-dress, which is not an accepted practice in our society. A preoperative transsexual dresses in “opposite” sex clothing while receiving hormonal treatment to see if he or she will truly be happier experiencing life as another gender. If the cross-dressing phase is successful, surgery is often performed.<sup>154</sup>

Individuals are routinely subjected to punitive treatment for cross-dressing,

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<sup>153</sup> LOTHSTEIN, *supra* note 152, at 7.

<sup>154</sup> Although people often talk about surgery as “correcting” gender dysphoria, it can also be thought as “confirming” the gender that the individual already experiences. For example, when Amy Bloom asked to see childhood (before surgery) pictures of an individual who had had surgery to confirm his male gender, she was surprised to see pictures of what appeared to be a little boy, not a little girl. See Bloom, *supra* note 152, at 40.

and the law provides few protections. Title VII and state antidiscrimination laws refuse to recognize discrimination against transsexuals, although clearly their sex has become a condition of employment.<sup>155</sup> The military subjects individuals who cross-dress to court martial<sup>156</sup> and discharges transsexuals.<sup>157</sup> Similarly, Title VII fails to protect men or women against clothing regulations that attempt to conform them to socially accepted rules for males and females.<sup>158</sup> As Mary Whisner has powerfully argued, the rules against cross-dressing reinforce gender differentiation.<sup>159</sup> Individuals who do not care to reinforce gender differentiation through their clothing and appearance are unprotected legally and clinically labeled as having "gender dysphoria."<sup>160</sup> And although gender dysphoria is recognized as a psychiatric disorder by the medical profession,<sup>161</sup> the Americans with Disabilities Act explicitly excludes transsexuals and transvestites from protection.<sup>162</sup>

The bane of a transsexual's existence is public restrooms. Single-sex restrooms are, of course, standard features in most buildings other than private homes, although we got rid of bathrooms segregated by race years ago. The ostensible rationale is safety (under the false premise that the only rape which occurs is committed by men against women) and privacy (which, itself, is defined along heterosexual and gendered lines), but even those rationales

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<sup>155</sup> See, e.g., *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Kirkpatrick v. Seligman & Latz, Inc.*, 636 F.2d 1047 (5th Cir. 1981); *Halloway v. Arthur Andersen and Co.*, 566 F.2d 659 (9th Cir. 1977); *Powell v. Read's, Inc.*, 436 F. Supp. 369 (D. Md. 1977); *Voyles v. Ralph D. Davies Medical Ctr.*, 403 F. Supp. 456 (N.D. Cal. 1975), *aff'd*, 570 F.2d 354 (9th Cir. 1978); *Snyder v. Jefferson County Sch. Dist. R-1*, 842 P.2d 624 (Colo. Sup. Ct. 1993); *In re Grossman*, 384 A.2d 855 (N.J. Super. 1978); *Doe v. Boeing Co.*, 846 P.2d 531 (Wash. 1993).

<sup>156</sup> See, e.g., *United States v. Davis*, 26 M.J. 445 (C.M.A. 1988).

<sup>157</sup> *Leyland v. Orr*, 828 F.2d 584 (9th Cir. 1987); *Doe v. Alexander*, 510 F. Supp. 900 (D. Minn. 1981).

<sup>158</sup> See generally Mary Whisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73, 97-106 (1982).

<sup>159</sup> *Id.* at 97-101; see also Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1414-21 (1992).

<sup>160</sup> Transsexualism also exists on a spectrum. "High-intensity" transsexualism is the type that is "cured" with surgery. See Bloom, *supra* note 152, at 47.

<sup>161</sup> Nonetheless, the American Psychiatric Association at its 1993 annual conference proposed that well-adjusted transsexuals not automatically be considered to have a mental disorder. Levy & Tuller, *supra* note 143, at A17.

<sup>162</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12,211(b)(1) (Supp. V 1993) (excluding "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders" from the term "disability").

dissipate in many contexts because of the existence of doors on bathroom stalls. The unavailability of any acceptable public restroom can cause substantial hardship in the life of a transsexual. Pat Williams tells a story about "S." who was a postoperative transsexual at a California law school, but who could not get either the male or female students to allow her to use their bathroom.<sup>163</sup> The dean of the law school also refused to allow the student to use his private bathroom out of fear that he would have been considered to have engaged in preferential treatment. As Williams says, "Into the middle of that struggle, S. was coming to me because others had defined her as 'nobody.'"<sup>164</sup> Bathroom problems have frequently arisen in the reported cases involving discrimination against transsexuals.<sup>165</sup> If public bathrooms were not sex-segregated, these classification problems for transsexuals would not occur.

Sex-segregated bathrooms do not only pose problems for transsexuals; they create gender differentiation for all men and women. At my own institution, for example, we have similar male and female bathrooms for faculty and staff (with several private toilet areas), except that the male bathroom also has a shower area. When I joined the faculty and expressed a desire to have access to that shower area, the university was kind enough to make a "woman in shower" sign for me that I could put over the door to the men's bathroom to convert it temporarily into a "woman's space." That solution satisfied my needs without breaking down the rigid gender barriers. No one, of course, suggested (including me) that we simply designate each bathroom as sex-neutral with individuals who want privacy in the shower having the option of putting up a "person in shower" sign when they wanted to temporarily close off one of the two bathrooms to others. This experience has also amused me by causing me some gender confusion as I struggle to remember whether I am a man or a woman when I go to the bathroom for faculty and staff. I often pause before the door, trying to remember what my purpose is at that moment—showering has become a male activity for me and using the toilet has become a female activity. If I need to change a sanitary napkin while using the shower, I often feel uncomfortable that I have trespassed in inappropriate territory when I discretely dispose of my garbage. Even as a feminist, I have been trained so well in the gendered rules of our society that I have trouble breaking them to dispose of a sanitary napkin in a bathroom labeled "men." Although sex-segregated bathrooms are typically considered a benign form of

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<sup>163</sup> Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2144–46 (1989).

<sup>164</sup> *Id.* at 2146.

<sup>165</sup> See, e.g., *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982) (involving complaints made by other female employees who did not want Sommers, a postoperative male-to-female transsexual, to use the women's rest room).

differentiation,<sup>166</sup> they may actually reflect a deep-seated, and in some cases coercive, desire to maintain a rigid artificial distinction between the sexes.

Despite the fact that the legal challenges brought by transsexuals often strike at the heart of our gender classification system, they are rarely taken seriously. Richard Green does an excellent job describing the mistreatment of transsexuals under the law in comparison to "transracials":

If there were a manner by which a person could "change race" rather than "sex," could a "transracial" be denied protection under Title VII? Race, for some persons, may be no more immutable than is sex for others. Consider a person of mixed black and white racial heritage, tan skinned, with moderately curled hair and no facial features clearly identifiable as black. Assume this person has always "as far back as s(he) can remember" been self-identified as black, but, nevertheless, has been treated by society as white. In the past, this person has utilized grooming chemicals that straighten hair. Assume also that the person is legally classified as white, having the requisite number of white ancestors. Now the person stops utilizing hair straightening chemicals, and undergoes plastic surgery to broaden the contours of the nose. Then, in keeping with a racial identity as black, this person presents himself or herself to the world as black. Should an employer consider this person as white or black? If the person were to be not hired or fired on the basis of membership in a racial class that has been the target of discrimination, would this be legally permissible? If the person were to be not hired or fired on the basis of having *changed race*, would this be legally permissible?<sup>167</sup>

The punitive treatment of transsexuals and transvestites and the coerced modification of the biology of hermaphrodites at birth is well-accepted. We are so insistent on maintaining the myth of a bipolar sex and gender system that we fail to tolerate any examples that undermine that classification system.

### B. *Ameliorative Treatment?*

Affirmative action for transsexuals, transvestites, and hermaphrodites is hard to imagine at this time in our history. The most positive steps that have been taken include a *failure* to continue to coerce individuals to maintain a gender identity that they have abandoned. Thus, for example, courts often allow transsexuals to change their names from an obviously male name to an

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<sup>166</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 468-69 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (suggesting that sex-segregated bathrooms are not problematic with his statement, "A sign that says 'men only' looks very different on a bathroom door than a courthouse door.").

<sup>167</sup> Richard Green, *Spelling "Relief" for Transsexuals: Employment Discrimination and the Criteria of Sex*, 4 YALE L. & POL'Y REV. 125, 138 (1985).



obviously female name,<sup>168</sup> although courts also sometimes refuse to allow transsexuals to have their birth certificates changed to match their sexual identity.<sup>169</sup> One of the most positive legal recognitions of a transsexual occurred in a divorce case in which the ex-husband tried to avoid support and maintenance payments by arguing that his wife, a male-to-female transsexual, was really a man, so that the marriage was void.<sup>170</sup> Ruling in favor of the transsexual wife, the court said that the "transsexual is not committing a fraud upon the public. In actuality she is doing her utmost to remove any false facade."<sup>171</sup> Of course, however, the case was predicated on the bipolar assumption, which the court described as "almost universal," that "a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female."<sup>172</sup> The court therefore had to place the wife in a rigidly bipolar framework in order to conduct the appropriate legal analysis; in no way does the court's decision undermine the polarized conception of gender that underlies our marriage laws. Nonetheless, other courts have been less liberal in tolerating the desired gender status of a postoperative transsexual who sought to take advantage of the institution of marriage.<sup>173</sup>

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<sup>168</sup> See, e.g., *In re Anonymous*, 314 N.Y.S.2d 668 (N.Y. Civ. Ct. 1970); *In re Anonymous*, 293 N.Y.S.2d 834 (N.Y. Civ. Ct. 1968).

<sup>169</sup> See, e.g., *Anonymous v. Mellon*, 398 N.Y.S.2d 99 (N.Y. Sup. Ct. 1977) (holding judicial intervention inappropriate); *Hartin v. Director of the Bureau of Records and Statistics*, 347 N.Y.S.2d 515 (N.Y. Sup. Ct. 1973) (holding that Department of Health did not act capriciously in issuing a new certificate changing only the first name of petitioner and omitting any designation of sex); *Anonymous v. Weiner*, 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966) (holding judicial intervention not appropriate to reverse Department of Health's refusal to change birth certificate designation). But see *K v. Health Div.*, 552 P.2d 840 (Or. Ct. App. 1976) (holding court to have authority to order change of name and sex designation on birth certificate), *rev'd*, 560 P.2d 1070 (Or. 1977) (holding issue should be decided by legislature).

<sup>170</sup> *M.T. v. J.T.*, 355 A.2d 204, 207 (N.J. Super. Ct. 1976), *cert. denied*, 364 A.2d 1076 (N.J. 1976). For another case involving positive treatment of a transsexual, see *Christian v. Randall*, 516 P.2d 132 (Colo. Ct. App. 1973) (denying custody petition by father who objected to children staying with wife who was undergoing female-to-male transsexual procedure). But see *Daly v. Daly*, 715 P.2d 56 (Nev.) (terminating parental rights of postoperative female-to-male transsexual), *cert. denied*, 479 U.S. 876 (1986); *Frances B. v. Mark B.*, 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974) (holding postoperative female-to-male transsexual could not succeed on divorce claim as no valid marriage had been entered into since he had no male sex organs).

<sup>171</sup> *M.T.*, 355 A.2d at 210.

<sup>172</sup> *Id.* at 207.

<sup>173</sup> See, e.g., *In re Declaratory Relief for Ladrach*, 513 N.E.2d 828 (Ohio Prob. 1987) (denying marriage license to postoperative male-to-female transsexual to marry male).

Although affirmative action for transsexuals, transvestites, and hermaphrodites seems implausible at this time in our history, one might argue that our tolerance for "corrective surgery" for transsexuals and hermaphrodites is an expression of ameliorative treatment. Transsexualism, or gender dysphoria, for example, is considered to be such a serious problem that surgery is covered under Medicaid.<sup>174</sup> Some commentators argue that such treatment is clearly ameliorative because, without surgery, many individuals would suffer long-term discontent.<sup>175</sup>

The public welfare cases may present a plausible example of ameliorative treatment, but they also show how extreme the condition of transsexuals must be in order to get any public assistance. In the prison context, for example, transsexuals argue that it would be "cruel and unusual punishment" or "deliberate indifference" for them to be denied estrogen therapy or surgery.<sup>176</sup>

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<sup>174</sup> See, e.g., *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980) (finding Iowa's policy of denying Medicaid benefits for sex reassignment surgery inconsistent with the objectives of the Medicaid statute); *J.D. v. Lackner*, 145 Cal. Rptr. 570 (Ct. App. 1978) (finding that Medi-Cal benefits cover radical sex conversion surgery for treatment of transsexualism); *G.B. v. Lackner*, 145 Cal. Rptr. 555 (Ct. App. 1978) (finding Medi-Cal claimant entitled to benefits for surgery to treat transsexualism); *Doe v. State Dep't of Pub. Welfare*, 257 N.W.2d 816 (Minn. 1977) (finding decision to deny medical assistance benefits to adult male transsexual arbitrary and unreasonable); *Denise R. v. Lavine*, 364 N.Y.S.2d 557 (N.Y. Sup. Ct. 1975) (finding denial of benefits for sex conversion operation arbitrary and capricious), *rev'd*, 347 N.E.2d 893 (N.Y. 1976) (finding denial not to be arbitrary or capricious). Prison inmates, however, have not been successful in obtaining estrogen therapy as a treatment for transsexualism. See, e.g., *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir.), *cert. denied*, 484 U.S. 935 (1987); *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986); *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977); *Farmer v. Carlson*, 685 F. Supp. 1335 (M.D. Pa. 1988); *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kan. 1986).

<sup>175</sup> See *Green*, *supra* note 167, at 125, 128. Nonetheless, the American Psychiatric Association, at its 1993 annual conference proposed that well-adjusted transsexuals not automatically be considered to have a mental disorder. *Levy & Tuller*, *supra* note 143, at A17.

<sup>176</sup> See, e.g., *White v. Farrier*, 849 F.2d 322 (8th Cir. 1988) (denying summary judgment because not appropriate on issue of whether transsexual inmate was subjected to deliberate indifference through failure to be given estrogen therapy); *Meriwether*, 821 F.2d 408 (finding that transsexual inmate stated claim under Eighth Amendment for failure to provide estrogen therapy and emphasizing that inmate was not entitled to estrogen therapy, but was entitled to medical treatment); *Phillips v. Michigan Dep't of Corrections*, 731 F. Supp. 792 (W.D. Mich. 1990) (granting preliminary injunction ordering correctional officials to provide transsexual inmate with estrogen therapy), *aff'd*, 932 F.2d 969 (6th Cir. 1991); *Farmer*, 685 F. Supp. 1335 (finding that transsexual inmate had been denied proper medical care by being denied conjugated estrogens); *Lamb*, 633 F. Supp. 351 (finding that inmate had no constitutional right to preoperative hormone treatment and sex change

Lawyers have to describe the prisoners' situation in horrific terms to meet this exceedingly, inappropriately high standard. The American Psychiatric Association has recently concluded that not all transsexuals need to be classified as having a personality disorder.<sup>177</sup> Yet, transsexuals have been taught that they virtually have to commit suicide in order to receive public assistance.<sup>178</sup> Judges must be convinced that the choice is between suicide or estrogen therapy. Little else would meet the stringently high standard. Our legal standards therefore reinforce a stark, bipolar model because the courts are only presented with suicidal transsexuals.

Given the dramatic stories of suicidal behavior that are required to obtain public assistance for transsexuals, it is hard to describe the granting of public assistance as ameliorative treatment. Saving an individual from suicide does little to place an individual on the road to a happy and successful life. We have much further to go in our treatment of transsexuals before we could describe our treatment of them as truly benign. A postoperative transsexual still faces enormous hardships and barriers in a society that cannot accept his or her transgendered status, as in Pat Williams's example of the postoperative transsexual who was not permitted to use any of the bathrooms at law school.<sup>179</sup>

As for hermaphrodites, it is very difficult to consider the surgery that is routinely provided at birth as ameliorative.<sup>180</sup> This coerced treatment has caused Anne Fausto-Sterling to ask,

Why should we care if there are people whose biological equipment enables them to have sex "naturally" with both men and women? The answers seem to lie in a need to maintain clear distinctions between the sexes. Society mandates the control of intersexual bodies because they blur and bridge the great divide; they challenge traditional beliefs about sexual difference. Hermaphrodites have

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operation).

<sup>177</sup> See Green, *supra* note 167, at 135-36.

<sup>178</sup> In order for plaintiffs to prevail in the prison context, they typically have to attempt to commit suicide or to remove some of their own sexual organs. For example, in *Supre v. Ricketts*, plaintiff attempted to remove his testicles six times, attempted to kill himself by hanging, and incised and removed a portion of his scrotum. 596 F. Supp. 1532, 1533 (D. Colo. 1984), *rev'd*, 792 F.2d 958 (10th Cir. 1986). Before successful judicial intervention occurred, the prison took the position that treatment for gender dysphoria could not occur in a penal setting. *Id.* at 1534. In concluding that medical treatment was appropriate, the judge ruled that "plaintiff's life was in jeopardy." *Id.* at 1535. It is appalling that an individual has to attempt mutilations, castrations, and suicide before a court can find that he or she is entitled to medical treatment for gender dysphoria.

<sup>179</sup> See *supra* notes 163-64 and accompanying text.

<sup>180</sup> See Fausto-Sterling, *supra* note 135.

unruly bodies. They do not fall into a binary classification: only a surgical shoehorn can put them there.<sup>181</sup>

Hermaphrodites are usually required to have surgery when they are infants, long before the age of consent. The decision to have surgery is virtually automatic, rather than reflective of whether there is any medical<sup>182</sup> or even psychological reason for surgery. If we, as a society, were not so horrified at the existence of hermaphrodites, we would allow surgery decisions to be made by an informed adult rather than by a (probably hysterical) parent. We would be able to tolerate more individualized treatment.

Interestingly, hermaphrodites and transsexuals reflect two different kinds of bigendered categories which we "cure" with surgery to the sex organs. Hermaphrodites reflect a mixing of biological sexual traits that we are not able to tolerate. Transsexuals reflect a mixing of gendered traits that we "cure" by changing the biological sex to match the gendered sex. In both cases, we "solve" the problem by engaging in surgery on the biological sex organs. In neither case, do we try to "solve" the problem by changing conventional understandings of sex and gender. It makes one wonder who is sick—hermaphrodites, transsexuals, or able-bodied society?

In the gender area, an investigation of the bi category reveals that there are many individuals who live in the middle or even move along the spectrum during their lives. Yet, we linguistically talk about "opposite" sexes and have no or little tolerance for individuals who try to live in the middle categories. We also have little tolerance for individuals who try to change from one polar category to another. We have to be sure to starkly define male and female by even insisting on the clothing we wear.<sup>183</sup> As a society, we are not sufficiently comfortable with how nature inherently distinguishes male from female. And, for those individuals who attempt to "play with nature" by changing their gender, we display our strongest sense of outrage.

## V. DISABILITY LAW: A NEW APPROACH

Unlike the other areas of the law examined in this Article, we have no term for bi individuals in disability rights law. Thus, it is hard to focus a discussion on how we have treated bi-abled individuals because we have never recognized

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<sup>181</sup> *Id.*

<sup>182</sup> There are life-threatening conditions that can occur as a result of being a hermaphrodite: hernias, gonadal tumors, and adrenal malfunction. *Id.*

<sup>183</sup> Until 1993, New Orleans had a law that banned cross-dressing except during Mardi Gras. See Dawn Ruth, *City Ban on Gay Bar Employees Repealed*, TIMES-PICAYUNE, Mar. 20, 1993, at B3.

that they exist as a distinct category. Nonetheless, disability rights law is concerned with definition and who fits into the category of "disabled." If one does not fit into that polarized category, no ameliorative benefits are available. Similarly, there have been discussions recently about the "abuse" of the disability rights law by individuals who are not "really" disabled, such as individuals with attention deficit disorder.<sup>184</sup> Because of the skepticism of such claims of disability, we may be creating bi categories for heightened (or unrectified) mistreatment. The absence of a linguistic category, therefore, does not entirely assure us that subordination is not occurring due to one's presence in a bi category. Nonetheless, I cannot find any examples of mistreatment due to bi-abled status that seem comparable to those that I discussed in the gender or sexual orientation areas,<sup>185</sup> such as a court martial for an individual who identifies as a transsexual.

Disabilities rights law also offers a perspective that is refreshingly different from the one that has historically been used in the areas of sexual orientation, race, or gender. The cornerstone to legal analysis under the Americans with Disabilities Act of 1990 (ADA)<sup>186</sup> and the related Individuals with Disabilities Education Act (IDEA)<sup>187</sup> is that individuals with disabilities should receive individualized assessments. There is a bipolar distinction between able-bodied and disabled that suffers from the previously discussed problems of bipolar distinctions, but within the category of disabled, there is individualized treatment. In this part of the Article, I will explore the effectiveness of this individualized treatment model to see what lessons we might learn if we wanted to try to develop a more individually-based model in the areas of race, gender, or sexual orientation.

### A. *The Individuals with Disabilities Education Act*

The IDEA is based on a bipolar model—disabled children are entitled to certain benefits and nondisabled children are not. Each disabled child<sup>188</sup> is

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<sup>184</sup> See, e.g., Richard E. Vatz, *Attention Deficit Delirium*, WALL ST. J., July 27, 1994, at A10; Gary Eisler, *Attention Deficit Disorder Can't Be Ignored*, WALL ST. J., June 27, 1994, at A12; *Disabilities Dissenter Crushed*, WALL ST. J., May 18, 1994, at A14.

<sup>185</sup> See *supra* parts III.A, IV.A.

<sup>186</sup> 42 U.S.C. §§ 12,101–12,213 (Supp. V 1993).

<sup>187</sup> 20 U.S.C. §§ 1400–1485 (1988 & Supp. V 1993) (formerly known as the Education for All Handicapped Children Act).

<sup>188</sup> Under the IDEA,

The term "children with disabilities" means children—

- (i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional

guaranteed an individualized educational plan.<sup>189</sup> Nonetheless, once an individual is placed within the label "disabled," individualized treatment does occur. There is no automatic assessment that a child should receive an integrated, segregated, or at-home education.<sup>190</sup> The setting for the child's education, as well as its structure, is developed on an individualized basis.

In theory, this model is an improvement over the one that we have seen in the race, sexual orientation, and gender areas, because it causes educational institutions to meet with parents, children, and professionals to develop an appropriate educational plan for each child with disabilities. There is no assumption that all children who are "retarded," for example, must be in a special classroom. Instead, each retarded child is evaluated to see exactly what kind of education is appropriate. One retarded child might be placed in a special classroom for children with substantial learning disabilities, another retarded child might be placed in a normal classroom with a special aide, and another retarded child might spend half a day in a special classroom and half a

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disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and  
(ii) who, by reason thereof, need special education and related services.

20 U.S.C. § 1401(a)(1)(A) (Supp. V 1993).

<sup>189</sup> Under the IDEA,

The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include [six criteria].

*Id.* § 1401(a)(20).

<sup>190</sup> Nonetheless, there is a policy decision contained within the statute that education in an integrated setting (both able-bodied and disabled children being educated together) is preferable, if possible:

[A] State shall demonstrate . . . procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(5) (1988).

day in a normal classroom. Moreover, the plan for each of these children will vary from year to year depending upon how they progress and what programs are available in their state or school district. This individualized treatment is quite a dramatic improvement from the days when such children monolithically received either no education or a segregated and quite inadequate education.

The procedure underlying the IDEA, however, is far from perfect. Poor children who have less access to legal advocacy get less individualized treatment. Because, by definition, the individuals who are entitled to assistance under the statute are children who also have disabilities that require special services, advocacy typically happens by the parents of a child. Parents with middle-class professional training find it easier to advocate within such a structure.<sup>191</sup> Moreover, the process of using an administrative structure is very time-consuming. Working-class people or unemployed individuals with family responsibilities find it difficult to take off from work or family obligations to attend numerous administrative hearings and meetings.<sup>192</sup> In cases in which parents have challenged the adequacy of the public school's placement of a child, often the parents pay for their child's private education while the inadequacy of the public education is being resolved legally.<sup>193</sup> That option is not available to poor parents.

The IDEA model raises the question of whether an individualized treatment model is inherently class-based. This question is particularly troublesome in the context of the IDEA, because the statute attempts to be sensitive to racial and ethnic biases that may be part of disability law through special rules.<sup>194</sup> Such rules may help states avoid using racial stereotypes in defining who has disabilities. Unfortunately, it does little for the child who has been correctly characterized as having a disability. Once the classification occurs, the statute requires no special sensitivity to that child's needs due to the race, ethnic, or

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<sup>191</sup> David Engel studied parent participation in individualized educational plans (IEP) and found that "effective parental participation in the IEP conference, however, proved to be the exception rather than the rule." David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 179 (1991).

<sup>192</sup> Engel found that most parents stopped attending their individual hearing after the first few years. *Id.* at 188.

<sup>193</sup> See, e.g., *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479 (9th Cir. 1992); *Tribble v. Montgomery County Bd. of Educ.*, 798 F. Supp. 668 (M.D. Ala. 1992); *Dreher v. Amphitheater Unified Sch. Dist.*, 797 F. Supp. 753 (D. Ariz. 1992), *aff'd*, 22 F.3d 228 (9th Cir. 1994).

<sup>194</sup> For example, the section on eligibility requirements states that each state must have procedures "to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory." 20 U.S.C. § 1412(5).

class bias of our educational or legal system.

The further question that this problem raises is whether there would be less class bias in a system with more formal, categorical rules and less individualized treatment. In other contexts, some scholars have suggested that formality benefits disadvantaged individuals because less discretion exists on the part of decisionmakers.<sup>195</sup> Although I agree with the critique of discretionary, informal systems, that critique does not offer us an obvious solution. By limiting ourselves to a formal system because of our fear of the race or class biases of discretionary systems of justice, we take a very pessimistic perspective that we cannot possibly rid our justice system of its discretionary biases. If we truly believe that children with disabilities will fare best through individualized determinations, our obligation as a society is to try to make available the resources that will allow those determinations to be made in a fair fashion. The IDEA does try to minimize the arbitrariness of such discretion by providing extensive procedural safeguards and administrative steps. Those safeguards are consistent with the argument that "[f]ormality and adversarial procedures thus counteract bias among legal decisionmakers and disputants."<sup>196</sup> As noted above, however, such additional procedures are costly in time and legal fees and therefore are not equally available to all children with disabilities. Free legal services for all children with disabilities who come from poor families could make those procedures more widely available. Unfortunately, the IDEA does not provide for such services, although many cities have public interest organizations that try to fill that need.<sup>197</sup> Finally, it is difficult even to formulate an effective way to use legal advocacy because, as many parents recognize, it is important to have a good long-term relationship with a school district if one has a child with disabilities. Contentious litigation could undermine a child's long-term interests, even if the litigation is successful.<sup>198</sup> Thus, it takes a very sophisticated parent and lawyer to advocate effectively on behalf of a child.

Critics of my proposal would point to the costs involved in increasing legal services to poor children with disabilities. The answer to these critics,

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<sup>195</sup> See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1389 (1985) (arguing that racial prejudice is more likely to occur in informal, discretionary settings than in formal, adjudicatory settings because the "human propensity to prejudge and make irrational categorizations is . . . checked by procedural safeguards found in an adversarial system").

<sup>196</sup> *Id.* at 1389 (footnote omitted).

<sup>197</sup> In Pittsburgh, for example, we have the Education Law Center, which tries to provide those services for free to children with disabilities. Nonetheless, it takes a sophisticated parent or guardian to find such services and use them aggressively.

<sup>198</sup> See Engel, *supra* note 190, at 194-203.



however, is not a difficult one. Under our Constitution and legal system, we recognize few rights to be as important as a free public education.<sup>199</sup> A child with disabilities who does not receive a free, appropriate education loses out on a lifetime of possibilities. As the Supreme Court has said, “[Education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”<sup>200</sup> Some costs of an inadequate education are monetary costs to society in lost productivity, but more importantly, those costs include the psychic and emotional costs of not developing the skills and abilities to live a fulfilling life. Thus, it seems like a very modest suggestion to say that we should try to do our very best to rid the IDEA framework of class or race bias.

The problem with suggesting that we allocate whatever costs are necessary to rid the IDEA of class or race bias is that class or race bias in education is not limited to children who are disabled. Why does a child who qualifies as retarded under the IDEA get full-scale individualized treatment to help maximize his or her educational possibilities, whereas another child who might have a below normal I.Q., but is not technically retarded, gets no individualized treatment at all? Similarly, why does a child who has an exceptional I.Q. not get individualized treatment to help maximize his or her potential? All children, one might argue, have individualized potentials. Why do we primarily care about the potential of the child who fits into the category “disabled”? Also, why should a child have to suffer the stigma of being classified as disabled to receive individualized attention?<sup>201</sup>

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<sup>199</sup> See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). In *Brown v. Board of Education*, the Court explained,

Today, education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms.

*Id.*

<sup>200</sup> *Id.*

<sup>201</sup> This stigma is quite complicated in the disability context. We tend to think of individuals with disabilities in the educational context as retarded or stupid. Children with physical disabilities that do not affect their mental capacity therefore often find it difficult to find an appropriate educational setting, because the special programs are usually for retarded children. In such a case, our shortsightedness in defining “disability” leaves a child with physical disabilities few acceptable educational choices. See generally Engel, *supra* note 190, at 185 (describing difficulties in finding placement for an intelligent handicapped child because school districts often assume that “the physically handicapped person is

These are difficult and important questions. The IDEA recognizes the stigma associated with the classification of "disabled," which is why there is special attention to how classifications can be made inappropriately due to race or ethnic bias. Similarly, the IDEA supports an integrated education, when feasible, in part to lessen the stigma associated with separate education. On the other hand, the IDEA forces a parent or guardian to seek to have his or her child categorized as disabled to receive special services.

Since the IDEA already uses individualized determinations to create appropriate educational programs, I would argue that a child should not have to be classified as disabled to argue for special services. One could, for example, say that all children who have special disability-related needs should be able to seek individualized services. A child may not be disabled with respect to his intellect, but may be disabled with respect to his vision. His vision might not be so poor as to render the child visually impaired or blind. Nonetheless, the child might benefit from some individualized attention to his vision ranging from a seat near the front of the classroom to special equipment for certain science exercises. Aside from cost, there is no reason not to make available to all students whatever assistance they need in overcoming particularized disabilities they may have, even if they do not fit the definition of "children with disabilities."

The larger problem that this discussion raises is whether benefits should be tied directly to whether one is disabled—whether we are inappropriately using the term "disabled" in a stereotypical way. I believe that we are. The issue should not be whether a person is disabled as that term is defined under the IDEA. Instead, the issue should be whether a person is not able to receive an appropriate education because of a disability. In other words, does the so-called disability actually disadvantage an individual? If the disability does not disadvantage an individual, then an individualized analysis of special needs is not necessary; if a disability does disadvantage an individual, then an individualized analysis is necessary, even if the person does not technically fit the definition of "children with disabilities." We contribute to the stigma associated with disability by assuming that all children with disabilities have special educational needs, and that no child who is technically able-bodied has special educational needs related to a disability.

A more concrete example may illuminate this discussion.<sup>202</sup> Three children may be in a classroom. Child A may be blind, child B may have strabismus (commonly known as crossed eyes), which leaves her with vision that is correctable to normal although she does not have stereoscopic vision (the

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automatically retarded").

<sup>202</sup> This example comes from my own experience in a ninth grade biology class, as well as my experience teaching in a classroom with some blind students.

ability to use both eyes at the same time, thereby gaining depth perception), and child C may not have the use of his legs. Let us assume further that they are in the same science class. Child A will not be able to read the class material or use a microscope without some kind of technological assistance. Child B will be able to read the course materials, but will not be able to use a stereoscopic microscope to see objects in depth. Child C will be able to read all of the class material, and use the microscope. Under the IDEA, children A and C are disabled and entitled to individualized education plans; child B is not disabled.

During a particular class session, however, in which the lesson is structured around the use of a stereoscopic microscope at a desk, child C may not be experiencing any educational disadvantage related to his disability,<sup>203</sup> whereas children A and B may be experiencing educational disadvantage. The IDEA would expect the school to assist child A, but not child B, although they may be experiencing similar problems—they cannot use the microscope to see depth as part of the class assignment.<sup>204</sup> Rather than focus on whether they fit a global definition of “disability,” I would suggest that it makes more sense to ask whether the disabilities that they have are depriving them of educational experiences. In the case of children A and B, the answer would be yes; in the case of child C, the answer would be no (on this particular day).

This solution, like the legal aid solution, of course, might cost money. We may not be able to afford to solve all of A’s, B’s, and C’s problems of disadvantage related to disability. That, however, is not a new problem. The Supreme Court has ruled that the IDEA does not provide each child with the right to a “potential-maximizing education.”<sup>205</sup> Instead, it provides each child with the right to “specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”<sup>206</sup> The Supreme Court made this decision out of the recognition that “the educational opportunities provided by our public school system undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student’s ability to assimilate information presented in the classroom.”<sup>207</sup> The solution, however, is not to use categories instead of individualized assessments. The solution for children A and B for

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<sup>203</sup> I am assuming that child C has been given a desk that is appropriate for a wheelchair.

<sup>204</sup> *Cf. Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985) (finding individual with strabismus not disabled for the purposes of the nondiscrimination clause of the Rehabilitation Act).

<sup>205</sup> *Board of Educ. v. Rowley*, 458 U.S. 176, 197 n.21 (1982).

<sup>206</sup> *Id.* at 201.

<sup>207</sup> *Id.* at 198.

that particular assignment in that science room may be costless—maybe they need to be paired with another student (like student C) who can use the stereoscopic microscope and could verbally describe what he or she is able to see. By contrast, if the only good solution for child B is a special, very expensive microscope, we may decide that the cost is not worth the modest gain in educational experience. Child B can attain educational benefit in that classroom without a special microscope for one assignment. By contrast, child A may need technological equipment so that she can read her course assignments. Because she can attain no educational benefit without such equipment, it should be provided to her. Finally, child C may come to school with a wheelchair and face no barriers in the classroom. Although he is disabled, he may have few or no special needs or costs and does not need a specialized educational plan for his substantive classes so long as the building is barrier-free. On the other hand, when we move out of the science classroom to the physical education classroom, the needs of children A, B, and C change enormously. Child C will then probably become a child with a disability-related disadvantage.

The lesson from these examples is that individualized assessments of disability-related disadvantage should determine our decisions about how to allocate resources to assist children, not whether children fit into certain bipolar categories. As people move from context to context, they take their range of disabilities and abilities with them; we can help remove the stigma associated with disability if we recognize the disability within each of us, and we can more effectively deal with disabilities if we assess them from the perspective of the disadvantages that they pose for us in our lives.<sup>208</sup>

### *B. Americans with Disabilities Act*

Like the IDEA, the ADA also uses a bipolar disabled and able-bodied distinction.<sup>209</sup> An individual who is not technically disabled receives no

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<sup>208</sup> Federal nondiscrimination law does just the opposite. An individual, for example, is not disabled under § 504 of the Rehabilitation Act or under the ADA unless the impairment substantially limits one of the individual's major life activities, such as employment potential. See Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1988 & Supp. V 1993); 42 U.S.C. § 12,102(2). Thus, an individual with strabismus who is discharged because he cannot perform one discrete function at a job is not sufficiently impaired to come under the statutory definition of disability. See *Jasany*, 755 F.2d 1244. I am arguing, by contrast, that we examine the concrete situation to see if a disability poses a disadvantage rather than worry about whether the individual experiences disability in other facets of his or her life. To the unemployed postal worker in *Jasany*, it is no solace to realize that his disability does not impair his ability to perform other employment.

<sup>209</sup> Under the ADA, the term "disability" means, "(A) a physical or mental

protection from discrimination and is not entitled to reasonable accommodation. On the other hand, if an individual is disabled, a broad arena of protection opens up.

The problem with this bipolar distinction can be seen in cases involving individuals who are "obese." Some courts have ruled that individuals who are obese are not covered by antidiscrimination law, other courts have ruled that individuals are covered only if the obesity is caused by systemic or metabolic factors, and yet other courts have ruled that obese individuals are always covered by antidiscrimination law so long as the employer perceives their obesity to impair their ability to do the job.<sup>210</sup> The fact that the courts have reached such a wide variety of answers on this question suggests that it is a close legal question. On the one hand, obese individuals do face negative stereotypes, and their status is typically caused by a physical condition. On the other hand, there is no easy way to define "obesity," and the condition is not necessarily always a medical one. But more importantly, why should whether an individual obtains a \$100,000 legal judgment<sup>211</sup> depend on the result of such a close legal question when, undoubtedly, individuals who are obese face discrimination based on unfounded stereotypes?

The most recent example that highlights the inappropriateness of the bipolar framework under the ADA involves Deborah Birdwell. Birdwell had wanted to see a movie with her niece.<sup>212</sup> Knowing that she could not fit into a movie theater seat, she called ahead to ask if she could bring her own chair and use it in the wheelchair section. She was told that she could. However, when she went to the theater with her chair, she was rudely told that she would not be able to use it. Birdwell sued the movie theater under the public accommodations provision of the ADA.<sup>213</sup> The outcome of the case will depend upon whether Birdwell's obesity is considered to be a disability. Why must Birdwell's obesity have to be a disability globally for a theater manager to allow her to bring her own chair to sit in the wheelchair section? Birdwell was politely making a reasonable request to a theater manager in order to patronize the theater. She suffered disadvantage because of her disability. If we viewed

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impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12,102(2).

<sup>210</sup> For a general discussion of the cases involving obesity, see James G. Frierson, *Obesity as a Legal Disability Under the ADA, Rehabilitation Act, and State Handicapped Employment Laws*, 44 LAB. L.J. 286 (1993).

<sup>211</sup> See *Cook v. Rhode Island, Dep't of Mental Health, Retardation and Hospitals*, 834 F. Supp. 57 (D.R.I. 1992), *aff'd*, 10 F.3d 17 (1st Cir. 1993).

<sup>212</sup> *Obesity Bias*, *supra* note 14, at 53.

<sup>213</sup> *Id.*

disability in terms of the disadvantages caused in concrete situations, rather than on a bipolar scale, we would easily recognize that Birdwell has a legitimate claim of disability-related discrimination.

Looking at disabilities in terms of disadvantage rather than categorization also helps us with the slippery slope argument that is often cited when discussing obesity. Since the term "obesity" does not have a standard definition, how can we distinguish between someone who is discriminated against for being merely overweight and for being obese? If we viewed disabilities in terms of disadvantage, we would not be concerned with that line-drawing. The body builder who cannot meet the arbitrary weight restrictions of United Airlines<sup>214</sup> would have as valid a claim as Deborah Birdwell who is classified as "morbidly obese." In both cases, they have been forced to suffer disadvantage due to their body weight. In both cases, these imposed disadvantages had nothing to do with their ability to perform their job. They should be entitled to make an individualized showing of disadvantage. Similarly, an obese individual who has not experienced disadvantage because of her obesity should not automatically get the protection of our antidiscrimination laws. The issue should be disadvantage rather than bipolar classification.

Although the disability laws contain a problematic bipolar framework, they also contain more individualized assessments than other areas of the law through various concepts: "reasonable accommodation," "undue hardship," "direct threat," and "otherwise qualified."<sup>215</sup> In some cases, such as undue hardship, the individualized assessment is a determination of the *employer's* financial capabilities.<sup>216</sup> In other cases, such as direct threat, it is an individualized assessment of the *employee's* risk to self and others.<sup>217</sup> In yet

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<sup>214</sup> See *Tudyman v. United Airlines*, 608 F. Supp. 739 (D.C. Cal. 1984).

<sup>215</sup> Title I of the ADA prohibits discrimination against a "qualified individual with a disability . . . who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." See 42 U.S.C. § 12,111(8). A reasonable accommodation is required unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. See *id.* § 12,111(9)-(10). The term "qualification standards" may include "a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* § 12,113(b).

<sup>216</sup> The term "undue hardship" means "an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B)." *Id.* § 12,111(10)(A). Subparagraph (B) specifies four factors relating to the nature and cost of the accommodation, as well as the financial resources of the covered entity. *Id.* § 12,111(10)(B).

<sup>217</sup> The regulations defining "direct threat" require that four individualized factors be considered: "(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential

other cases, such as otherwise qualified, it is a determination of the relationship between the abilities of the disabled person and the requirements of the job.<sup>218</sup> Thus, an individual with HIV infection may be at the early stages of the disease, may be able to perform her job as a surgeon with no reasonable accommodation, and may not pose any threat to self or others because of her diligent use of CDC-recommended barrier precautions. Another individual with HIV infection may be at an advanced stage of the disease, may be unable to perform her job as a surgeon because of mental and physical deterioration that has occurred, and may pose a risk to self and others by trying to perform her job because CDC-recommended barrier precautions cannot sufficiently protect her and others from exposure to HIV infection.<sup>219</sup> These are people with HIV infection who must be individually assessed; there is no monolithic treatment for such persons under the ADA.

In other areas of the law, however, I have argued that we resist individualized assessments. Instead, we starkly divide people into bipolar categories and treat them monolithically within those categories. Sometimes, we recognize a middle or bi category, as in the transracial adoption area, but that middle category does not indicate that we are beginning to develop a spectrum. Instead, the middle is simply a new point to define without consideration of the ameliorative purposes that could be presented by that middle point. It is time that we learn from the individualized treatment within the disability rights model.

The lesson, however, is a complicated one because individualized treatment is administratively difficult to pursue in a fair way, and it is costly. Thus, I believe that it is too radical to suggest that we completely abandon our current ameliorative classification system until we have a good individualized system with which to replace it. I recommend that we begin with those areas of the law in which classification systems seem to be serving the most important purposes and seek to refine those classification systems through more individualized determinations. For those of us in the university setting, admissions and appointments may be a good place to start. We can begin by looking more

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harm." 29 C.F.R. § 1630.2(r) (1992).

<sup>218</sup> In determining whether an individual is "otherwise qualified," the ADA specifies that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12,111(8).

<sup>219</sup> Compare *Bradley v. University of Texas*, 3 F.3d 922 (5th Cir. 1993) (holding HIV-positive surgical technician not otherwise qualified to continue in his employment), *cert. denied*, 114 S. Ct. 1071 (1994) with *Roe v. District of Columbia*, 842 F. Supp. 563 (D.D.C. 1993) (permitting HBV-positive firefighter to perform job without any restrictions), *vacated by* 25 F.3d 1115 (D.C. Cir. 1994).

closely at who we define as automatically deserving affirmative action in admissions or appointments, and asking how these individuals meet our rationales for affirmative action. If our rationale is helping individuals to overcome disadvantage, then we must engage in an individualized discussion of disadvantage, while also being mindful of society's group-based rules that impose disadvantage on nearly all members of certain groups in our society. If our rationale is a role model theory, then we need to investigate whether these individuals will seek to serve as appropriate role models. Finally, if our rationale is diversity of ideas, then we need to inquire how group-based membership has helped shape the ideas and values of an individual. Most importantly, we should not allow the children of privilege who have largely been shielded from disadvantage to benefit from affirmative action under the first rationale. Ameliorative treatment should be accorded as a first priority to the most disadvantaged individuals in our society, irrespective of the categories to which those individuals belong.

## VI. CONCLUSION

This Article has attempted to focus on bi categories to improve our understanding both of the nature of subordination and how we can help overcome the history of subordination through ameliorative programs. In Part II, we saw how the law has used (or tried to ignore) the "multiracial" category. I argued that many of the seminal race cases were about multiracial categories, although we tend to remember them as being about African-Americans. I then looked at two contemporary areas of the law in which the courts and legislatures are currently grappling with the reality of multiracial individuals—transracial adoptions and affirmative action. Rather than lump people into the categories "black" and "white" for adoption and affirmative action purposes, I argued that we should try to develop more individualized determinations that recognize the multiracial heritage of many individuals who are classified as black.

In Part III, I applied a bi perspective to the area of sexual orientation law. I showed how the law has tried to construct the category "homosexual" so as to keep invisible the large number of people in our society who have had same-sex sexual experiences as well as opposite-sex sexual experiences. Because these categories have been developed to subordinate people on the basis of sexual orientation, there is little to be gained from refining these categories further. Nonetheless, as we currently turn to developing affirmative legislation in the area of gay rights, I argued that we need to confront how to create respectful categories. We need to develop those categories mindful of the spectrum of human sexual behavior.



In Part IV, I applied a bi perspective to the area of sex and gender. We have many linguistic terms to describe people who are a mix of sexes and genders—hermaphrodite, transvestite, transsexual, and androgyny. Nonetheless, we saw that the law is determined to classify people into bipolar conceptions of sex and gender (male or female). There is much evidence that courts and society are very uncomfortable with the middle categories in the sex and gender area. The Americans with Disabilities Act, for example, explicitly excludes transvestites from coverage.<sup>220</sup> Transsexual cases are disfavored under Title VII of the Civil Rights Act.<sup>221</sup> The Olympics continually struggles to find a classification scheme that will achieve the desired results of classifying individuals as male or female.<sup>222</sup> In many ways, sex and gender classifications offer the greatest challenge of any of the examples discussed in this Article, because the classification scheme is a combination of biology and culture. It is also difficult to assess when classifications exist for ameliorative purposes rather than subordinating purposes in the sex and gender area. For example, I argued that it is often subordinating rather than ameliorative for hermaphrodites or transsexuals to have their biological sex “corrected” through surgery to help them better fit into our bipolar classification scheme for sex and gender. It is ironic that the sex and gender area contains so many terms to describe someone of mixed sex or gender, because the law and society seem more determined to force individuals into bipolar categories in this area than in any of the other previously discussed areas of the law. Nowhere else do people routinely engage in surgery to assist them to fit into a bipolar category.<sup>223</sup> I

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<sup>220</sup> 42 U.S.C. § 12,211(b)(1).

<sup>221</sup> See, e.g., *Dobre v. National R.R. Passenger Corp.* (“AMTRAK”), 850 F. Supp. 284 (E.D. Pa. 1993) (holding that transsexuals not covered by Title VII).

<sup>222</sup> See Christopher Anderson, *Tests on Athletes Can’t Always Find Line Between Males and Females*, WASH. POST, Jan. 6, 1992, at A3; *French Medical Group Says New Olympic Sex Test Faulty*, PHIL. DAILY NEWS, Jan. 29, 1992, at 59.

<sup>223</sup> Of course, it is true that some individuals engage in cosmetic surgery to “fix” their nose or other feature with which they are dissatisfied. Arguably, such cosmetic surgery assists individuals to look more like the dominant racial group. Similarly, blacks often straighten (or “relax”) their hair to look more acceptable to mainstream society. Nonetheless, I do not see those examples as people trying to move from one bipolar category to another. A black woman who relaxes her hair is usually still perceived as black by herself and others. She is an individual who is trying to fit a dominant set of criteria for beauty notwithstanding her minority status in society. See generally Katrina Grider, *Hair Salons and Racial Stereotypes: The Impermissible Use of Racially Discriminatory Pricing Schemes*, 12 HARV. WOMEN’S L.J. 75 (1989). Another way to understand this phenomenon is that blacks, particularly black women, who refuse to modify their physical appearance by conforming to white standards (such as relaxed hair) may face more discrimination in the workplace and elsewhere than blacks who modify their appearance. *Id.* at 186. This

therefore argued that the fixation with bipolar categories in this area of the law may reflect a strong fear of the mixed category. Because of our strongly negative attitudes to this mixed category, we have not even tried to engage in any individualized, ameliorative treatment.

In Part V of this Article, I presented a general overview of the perspective that underlies disabilities rights law. Although disabilities rights law suffers from the problem of being bipolar in orientation, I argued that it also offers individualized assessments within the category of "disabled." This area of the law can help us learn how to conduct respectful, individualized assessments in other areas of the law while being mindful of the administrative need to retain some group-based categories.

Thus, by examining four areas of the law—race, sexual orientation, gender, and disability—we have seen that there is not one way that our laws and society have treated bi individuals. In some cases, when bi individuals are able to "pass," they are able to escape some subordinating treatment that they might otherwise experience. Some light-skinned blacks or married bisexuals, for example, may sometimes be able to escape discrimination which is ordinarily visited upon blacks or homosexuals. In other cases, we especially deplore the members of a bi category, such as transsexuals, not allowing them any comfortable existence along the spectrum. Yet, in some areas, such as gender, we simultaneously deplore transvestites while approving of androgynous individuals, although the difference between these two categories can often be purely semantic. There is no single story of bi existence, although there are many stories that reflect our society's obsessive need to categorize individuals into the polar points of the spectrum irrespective of their physical or social traits.

In this Article, I have tried to render bi individuals visible. I hope that we will have such individuals in mind in the future as we create ameliorative programs to redress a history of group-based subordination in our society. I hope that we will do a better job in the future of considering how the life histories of individuals make them deserving of ameliorative treatment as we create ameliorative programs. We need to be less stereotypical and bipolar in our thinking about how race, sexual orientation, gender, and disability matter in people's lives.

Aside from these legal discussions, I also hope this Article has helped each of us learn more about the bi within us. James Lindgren has said, "[W]riting about race can be an overwhelming experience emotionally. Anyone who works in this area must know that, if it doesn't cause you pain, then it's not

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problem is similar to the one that I discussed in Part II.B.1 concerning the possible preferential treatment of light-skinned blacks compared to darker-skinned blacks.

about race.”<sup>224</sup> I would add that writing about race, sexual orientation, gender, and disability is also an overwhelming experience emotionally. As an individual, I have had to think about my own bi’s. I realize that I am a dark-skinned white woman of United States citizenship, who is Jewish but married to a non-Jewish Canadian citizen, the mother of a mixed-religion and mixed-nationality child, androgynous, bisexual, and bi-abled. Reading about the pain we visit upon transsexuals has forced me to think about my own discomfort in rigid gender-appropriate clothing and single-sex bathrooms. I have come to admire transsexuals’ courage in crossing rigid gender boundaries.<sup>225</sup> I realize that I know little about my racial and cultural heritage, in part, because of the forced migration of Jews over the ages. I therefore identify with the lost history of many people in our society with African ancestors. I have enjoyed reading about the bi’s of others and hope this Article encourages the reader to explore his or her own bi’s as well as to see how the law has helped shape both the bipolar extremes and the middle. If Albion Tourgée, who was co-counsel in *Plessy v. Ferguson*<sup>226</sup> and a northern white, were to apply to Columbia Law School in 1995, I wonder what he might say in his statement about racial or ethnic identity.

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<sup>224</sup> Lindgren, *supra* note 15, at 1087.

<sup>225</sup> As I was finishing this Article, I was playing with my two-and-one-half year old daughter. She said to me, “Mommy, today I am going to be a boy. Tomorrow, I am going to be a girl.” I then asked her, “What is mommy, a boy or a girl?” She said, “Oh, mommies are girls, but today I am going to be a boy, and tomorrow I am going to be a girl.” I then said, “That’s great. You can be a boy or a girl anytime you want.” She then smiled mischievously and said, “Today I am going to be a girl. Tomorrow I am going to be a boy. You’re always going to be a girl because you’re a mommy.” I wonder when society will socialize her into believing that she can only be a girl.

<sup>226</sup> 163 U.S. 537 (1896).

